83-793

No.

In the Supreme Court of the United States

October Term, 1983

WILLIAM E. HUGHES,
Petitioner,

vs.

ALAN S. WHITMER, Superintendent, Missouri State Highway Patrol,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Court of Appeals have remanded the case to the District Court for findings of fact on the First Amendment issues involved in the Highway Patrol's actions in ordering the transfer of Trooper Hughes (the Petitioner), rather than engaging in a *de novo* review of the evidence, when (a) Petitioner had timely raised and preserved the First Amendment issues, (b) those issues specifically were not reached by the District Court, and (c) a determination of the First Amendment issues involves assessing the credibility of witnesses?

2. If *de novo* review of the evidence relating to the First Amendment issues by a reviewing court is proper where the District Court did not reach those issues, were the Highway Patrol's actions in ordering the transfer of Petitioner violative of his First Amendment rights?

3. Should the case be remanded to the District Court for the receipt of further evidence upon the First Amendment issues involved in the ordered transfer of Petitioner?

4. Were the findings of the District Court (a) that the rapidly ordered transfer of Petitioner from Troop G to Troop C was disciplinary in nature, (b) that under state law or regulation Petitioner was therefore entitled to a hearing, and (c) that Petitioner's procedural due process rights would be violated by such transfer without a hearing, clearly erroneous?

5. Did Petitioner have such a legally protectible interest, be it either a property or a liberty interest or a combination thereof, so as to be entitled to a due process hearing with respect to the ordered transfer from Troop G to Troop C under the circumstances here?

PARTIES TO THE PROCEEDINGS

The Petitioner is William E. Hughes, a Trooper in the Missouri State Highway Patrol, who initiated this action as Plaintiff in the District Court.

The Respondent is Alan S. Whitmer who during the proceedings in District Court was the Superintendent of the Missouri State Highway Patrol. While this case was pending in the Court of Appeals Alan S. Whitmer took early retirement and Howard J. Hoffman succeeded him as Superintendent of the Patrol.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution:

Statutes and Regulations:

Other Authorities:

No.

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OPINIONS BELOW

The February 11, 1982, Memorandum and Order of the United States District Court for the Western District of Missouri, Central Division (per Judge Scott O. Wright), which granted Petitioner injunctive relief is set forth as Appendix C to this Petition and is reported at 537 F.Supp. 93. The April 2, 1982, Order of the District Court granting Petitioner attorney fees is set forth as Appendix D to this Petition and is unreported. Respondent appealed from each of those orders to the United States Court of Appeals for the Eighth Circuit,

The Opinions (majority opinion by Senior Judge Floyd R. Gibson, Judge John R. Gibson, concurring, reversing the District Court; dissenting opinion by Judge Theodore McMillian) of August 4, 1983, by the United States Court of Appeals for the Eighth Circuit are set forth in Appendix A to this Petition and are reported at 714 F.2d 1407. The Order of September 15, 1983, of the Court of Appeals denying Petitioner's motion for rehearing (Judges Heaney, Bright, McMillian and Fagg *would have granted rehearing* on the First Amendment issue)* is set forth in Appendix B to this petition and is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals was entered August 4, 1983. Petitioner's Motion for Rehearing en banc was denied by order entered September 15, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of the First, Fifth and Fourteenth Amendments to the United States Constitution and of 42 U.S.C. § 1983 are set forth in Appendix F hereto.

Subsection 1 of Section 43.120, Revised Statutes of Missouri, and Section 43.150, Revised Statutes of Missouri, are set forth in their entirety in Appendix F.

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*As of the date of the filing of the Motion for Rehearing, there were eight regular active judges on the United States Court of Appeals for the Eighth Circuit. The Honorable Pasco Bowman became the ninth regular active judge on September 2, 1983.

Missouri Highway Patrol General Order No. V-16-104 issued by the superintendent of the Patrol sets forth the regulations of the Patrol relating to "Complaint Proceedings and Disciplinary Rules." This is set forth at length at the end of and as a part of the District Court Memorandum and Order which is reprinted as Appendix C to this Petition.

STATEMENT OF THE CASE

This is a case for injunctive relief brought by a Missouri State Highway Patrol member, Trooper William E. Hughes, pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988. Petitioner Hughes contends that an order of the then superintendent of the Patrol, Alan S. Whitmer, involuntarily transferring Hughes from Troop G in Willow Springs, Missouri (rural south Missouri), to Troop C in metropolitan St. Louis, Missouri, violated his rights as guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution.

Trooper Hughes has been a member of the Patrol since 1970 and has been stationed throughout his active career in Troop G which is composed of nine essentially rural counties in southern Missouri. Such long tenure at a particular location is normal, and transfers between troops usually only occur by reason of promotion, a member's request or for disciplinary reasons.

Hughes was advised orally on Friday afternoon, October 16, 1981, that he was being permanently transferred to Troop C (the "Siberia" of the Patrol for rural troopers) and that he should report there for duty Monday morning, October 19. Hughes was not notified of any charges against him, either orally or in writing on October 16,

1981. Hughes asked the Troop commander, Capt. McKee, that he be allowed to have his attorney present at Troop headquarters that afternoon, but that request was denied. On Monday morning, October 19, Hughes reported to Troop C, and then took annual leave to try to work matters out within the Patrol without litigation. Failing at that he proceeded to start work at Troop C without moving permanently to the St. Louis area, and his wife and family remained at their home in Willow Springs.

Hughes then filed this action for injunctive relief, and a preliminary injunction hearing was promptly scheduled and heard on November 24 and 25, 1981, before the Honorable Scott O. Wright of the United States District Court for the Western District of Missouri. The parties agreed that the record at that hearing might be considered as the record on the merits of the request for a permanent injunction.

Turning to the facts of the case, what preceded the transfer?

I. The Drug Investigation of a Superior's Son

There was considerable evidence that Hughes' investigation of a superior's son's drug activities raised the ire of that higher ranking officer. The Hughes' investigation was authorized, however, by the Troop Commander, Capt. McKee. Hughes suspected that this higher ranking officer, Lt. Elmore, was leaking information to his son about the ongoing investigation. To verify this, Hughes' partner informed Lt. Elmore of a supposed raid on a house where Elmore's son was thought to be working from with other drug suspects. The following day, the suspects moved out. Hughes testified that as a result of this investigation, people in the Patrol and the Willow Springs

community related threats from Lt. Elmore to the effect that Elmore was out to get Hughes' job. The evidence is undisputed that Lt. Elmore hired his own investigator to follow Hughes. Hughes further testified that he received no cooperation or equipment from the Patrol in assistance of this investigation.[1]

II. The Mountain View Airport Surveillance

Hughes suspected that frequent late-night flights in and out of the Mountain View, Missouri, airport might be related to drug smuggling into the area. The airport is in a rather remote area of the Ozarks, but has a long lighted runway that will accommodate almost any type of plane.[2] He asked his superior, Capt. McKee, for special nighttime surveillance equipment. McKee told Hughes he would get the equipment from patrol headquarters, but cautioned Hughes to be careful as several prominent individuals housed their aircraft at that airport. Despite additional requests from Hughes, the equipment never

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1. Subsequent to the trial before Judge Wright, Tom Elmore and others were arrested, and drug charges were filed against them by the county prosecuting attorney. An undercover agent whose testimony was needed to "make the case" thereafter disappeared, and the drug charges were dropped.

2. Drug traffic in the Ozarks has become a problem of considerable magnitude involving persons in all walks of life (even a state circuit judge in a nearby circuit). A local pilot had indicated to Hughes that he had been offered $30,000 to fly some drugs into Mountain View (Tr. 58). That the Mountain View airport may have been used for drug traffic purposes was *never* challenged by the Patrol command structure - and, in view of the fact that a local veterinarian as well as others seen in the Mountain View area have since been convicted on charges of conspiring to distribute cocaine by bringing it into remote Ozark airports, it would appear that Petitioner certainly acted reasonably with respect to the Mountain View airport. See record in *United States v. Sinor, Depee, Offutt, and Dacquel*, No. LR-CR-83-9(1)(2)(3)(5), E.D. Ark., W. Div.; on appeal by defendants to the Eighth Circuit as Nos. 83-1864 and 83-1872.

came. The suspicious flights, however, stopped shortly after Hughes disclosed his suspicions to his superiors. The evidence also showed that a Missouri state legislator, Danny Staples (a close friend of Lt. Elmore), who kept an airplane at the Mountain View airport, complained to Superintendent Whitmer about the investigation. Whitmer testified that he told Staples he "would make an inquiry into the matter" and would "resolve the problem."

III. The Cover-Up of a Radio Dispatcher's Dereliction of Duty

One night while working the desk, Hughes received a report of an automobile accident. Because of a shortage of personnel that evening, Hughes went to the accident scene and radioed back to the troop's radio dispatcher for a fire truck, ambulance, and wrecker. The dispatcher refused to do it, telling Hughes angrily that he was busy on the phone. The Willow Springs city police eventually dispatched the assistance after hearing Hughes' repeated requests on the radio. Hughes informed Capt. McKee of the dispatcher's recalcitrance and was directed to file a report. The captain took this report to the dispatcher and ordered him to rewrite it. The dispatcher rewrote the report, the new version exonerating himself and blaming Hughes. Hughes was then told by the captain not to report the incident to Patrol headquarters in Jefferson City, Missouri, as such would reflect poorly on the captain's ability to run his troop.

IV. The Cover-Up of the Beating of an Arrestee

Another of Hughes' actions involved questioning the cover-up of an incident of police brutality involving two trooper - a suspect was allegedly beaten while he was handcuffed. A Sgt. Zorsch prepared a report of the in-

cident that stated that the allegation was in some respects *true* and that *one of the troopers had admitted the beating.* Capt. McKee *ordered* Zorsch to rewrite the report so that it stated that the arrestee received his injuries in an accidental "fall". Hughes retrieved Zorsch's initial report from a wastepaper basket believing that the captain and a lieutenant were attempting to cover up the incident because of a threatened civil rights lawsuit against them. Hughes, fearing that his immediate superiors would do nothing with the information, reported the incident to Claud Trieman, a friend who was also a member of the Governor's Crime Commission. Hughes hoped that as a member of this Commission, Trieman could effectuate reform within Troop G by reporting the incident to the upper echelon of the patrol.[3]

V. Hughes' Association With Claud Trieman

Hughes' close friend Claud Trieman, referred to above, was a local industrialist who had assisted in Hughes' unsuccessful efforts to become superintendent of the patrol[4]

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3. The majority opinion of the Court of Appeals dismisses this incident as one where there was no cover-up because Capt. McKee ". . . could have reasonably reached a different conclusion." 714 F.2d at 1423. Subsequent events prove beyond cavil *that there was in fact a cover-up by Capt. McKee and Lt. Hickman* of this beating incident. See, the subsequent court record with respect to the unmasking of this cover-up which is detailed in Appendix I to this Petition.

4. While members of the Patrol are subject to Section 430.60, RSMo, which states that they shall not ". . . electioneer for or against any party ticket, or any candidate for nomination . . .," the Patrol nevertheless has been structured so that by the *same* statute one-half of the Patrol must be Democrats and one-half of the Patrol must be Republicans. In practice this has resulted in a Democratic governor appointing a Democrat out of the ranks as superintendent of the Patrol and a Republican governor appointing a Republican out of the ranks as superintendent. This has resulted in lower ranking officers being immediately "promoted" to the superintendent's colonel rank on a number of occasions in the past.

(Alan Whitmer eventually received the nomination). Hughes testified that his Troop G superiors, Lt. Hickman, Lt. Elmore and Capt. McKee, resented Hughes' political activity because it was "not a normal thing for one in [Hughes'] position as a lowly trooper" to do. Also, the various disciplinary reports prepared by McKee and Hickman (that led to the transfer order) listed Hughes' off-duty association with Trieman[5] as one of the reasons why he should be disciplined.

VI. The Transfer Order

In August 1981, Capt. McKee reported a "problem" within Troop G to Maj. Hoffman at Patrol headquarters. The problem was the allegation concerning Lt. Elmore's son's drug activity (even though McKee had specifically approved Hughes' investigation of young Elmore).

In September 1981, Hoffman learned that legislator Staples had complained to the captain of Troop I about Hughes' investigation of the Mountain View airport. It was at about this time, that Supt. Whitmer told Staples he would "resolve the problem." Shortly thereafter, on about October 4, Lt. Elmore complained of Hughes' investigations and association with Claud Trieman to Supt. Whitmer. Elmore suggested that a solution to the "problems" would be to transfer Hughes to Troop C, generally considered by the rural trooper to be the "Siberia" of the Patrol. (One trooper had been transferred in the recent past from Troop G to Troop C as punishment for being intoxicated while on duty.)

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5. Since the trial of this cause, Mr. Trieman who was a forceful member of the Governor's Crime Commission was killed in an airplane crash (the cause of which has yet to be determined by investigators).

When Elmore returned to his troop he told several troopers that he, Elmore, was having Hughes transferred to Troop C. Lt. Elmore also sought to obtain information that would discredit Hughes, hiring an investigator for this purpose.

Elmore then formally initiated on October 12, 1981, the disciplinary transfer action by making a written recommendation styled:

"Disciplinary action - Trooper W. E. Hughes"

Elmore's report recommended that Hughes be transferred because of Hughes' investigation of the lieutenant's son, because of Hughes' other "seemingly uncontrollable actions over the last few years" that discredited the patrol, and because of Hughes' relationship with Claud Trieman. Lt. Hickman endorsed this report as did Capt. McKee who added that because Hughes had "caused a great deal of turmoil in the Troop . . . with his controversial actions and political maneuvering," he should be transferred "for the benefit of all concerned." The Elmore recommendation and Hickman and McKee endorsements are set forth in Appendix E and were not revealed to Petitioner until the trial before Judge Wright.

Supt. Whitmer "endorsed" and approved the Elmore recommended transfer - stating that because of "Trooper Hughes' actions," "a strong corrective measure must be taken." See Appendix E.

The Rulings Below

Although Hughes challenged the transfer on due process and First Amendment grounds,[6] the District Court

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6. Portions of the original complaint which raise both the due process and First Amendment questions are set forth in Appendix F to this Petition.

permanently enjoined the transfer on due process grounds alone, never reaching the First Amendment issue. The District Court concluded that the transfer was disciplinary and that Missouri State Highway Patrol General Order No. V-16-104 (see Appendix C) makes manifest that

> "any member of the Patrol who is confronted with the threat of disciplinary action is entitled to written notification of the charges against him, a hearing before a disciplinary board and an appeal to the Superintendent of any disciplinary action taken by the board. Where disciplinary action is warranted, a Patrol member might be fined, demoted, transferred, suspended or dismissed."

Hughes v. Whitmer, 537 F.Supp. 93, 95 (W.D. Mo. 1982).

The Court of Appeals reversed in a 2-1 decision, the majority holding that the District Court erred in holding that the dispositive issue was whether Hughes' transfer was disciplinary, stating:

> "This analysis would have been correct if the district court had been sitting in a diversity case governed by Missouri law. But Hughes brought suit under 42 U.S.C. § 1983 (1976) alleging that he was deprived of his fourteenth amendment right to due process under color of state law. The necessary predicate to such a suit is establishing that the plaintiff had a legitimate claim of entitlement to an identifiable property or liberty interest."

Slip op. at 8. This, the court concluded, Hughes did not do.

However, rather than remanding the case for reconsideration by the District Court of Hughes' First Amend-

ment contention, the Court of Appeals majority reviewed the evidence *de novo*, resolved all credibility issues in favor of the command structure of the Patrol, and concluded that Hughes' claim bordered on the "frivolous," and denied the claim.

Judge McMillian, in a 29-page dissent, argued that because the case involved innumerable factual disputes and sensitive First Amendment issues, it should have been remanded to the district court for further findings of fact as the court had done in similar cases recently.

Hughes filed a motion for rehearing by the court en banc which was denied by order of September 15, 1983. The court's order denying the motion for rehearing specifically noted that Circuit Judges Heaney, Bright, McMillian and Fagg would have granted rehearing on Petitioner's motion.[7]

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7. In the footnotes to the Statement of the Case as well as in Appendix I we have set forth certain events or court proceedings that has transpired *since* the trial of this cause which substantiate and lend credence to the testimony of Trooper Hughes and the validity of his "whistle blowing" which the majority opinion of the Court of Appeals completely discounted. The truth of these subsequent events cannot, we believe, be properly questioned. In order, however, that there be no question in this respect, Petitioner hereby requests the Respondent pursuant to the provisions of Rule 36, F.R.Civ.P. to admit the truthfulness of the post trial facts set forth in the foregoing footnotes and also to admit the accuracy of the recounting of the proceedings and the deposition testimony in the *Hicks* case as set forth in Appendix I to this Petition.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because the Court of Appeals in Refusing to Remand the Case to the District Court for Further Findings of Fact on the Petitioner's First Amendment Claim and in Engaging in a De Novo Review of the Facts Relating to That Claim So Far Departs From the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

Petitioner's basic contention that a writ of certiorari should issue in this case cannot be described in better terms than was done by Judge McMillian of the Court of Appeals for the Eighth Circuit in dissent:

> "IV. WHY A REMAND IS NECESSARY
>
> The majority cogently points out that '[f]ree speech claims are not to be considered in a vacuum, but must be viewed in light of the circumstances and in context with all relevant conditions existing at the time of the asserted free speech activities.' *Supra* at 22. I could not agree more. This court has repeatedly emphasized that it cannot and will not review sensitive first amendment issues *de novo*. *See, e.g., Nathanson v. United States*, 702 F.2d 162, 165 (8th Cir. 1983); *Brockell v. Norton*, 688 F.2d 588, 593 (8th Cir. 1982). The primary reason why I have explored Hughes' evidence in such detail is to show that there still remains a sharp dispute on the facts. The majority, after a thoughtful reading of the record, has adopted the Patrol's version of the truth, and I have presented Hughes'

version of the truth. *The only way this dispute can be resolved is to have the trier of fact make the necessary credibility determinations and findings of fact.* I must emphasize that this does not mean that I accept Hughes' 'facts' as proven and true. Truth is subjective. In our trial system of dispute resolution, the official 'objective' factual truth is a matter for the trier-of-fact to decide. I would leave the initial task of finding the 'objective' factual truth in this case to the district court. A court of appeals is just not able to make credibility determinations from a faceless record. *See British Airways Board v. Port Authority of New York*, 558 F.2d 75, 82 (2nd Cir. 1977) ('Basic tenets of fairness require that a federal appellate court should not consider an issue involving questions of fact not resolved below.') The great disparity between the majority's reading of the record and my reading of the record highlights this truism." (Emphasis added)

That Judge McMillian was not alone in his view of this case should be of great significance to this Court. Judges Heaney, Bright and Fagg joined Judge McMillian in voting that this case be reheard by the Court *en banc* on the First Amendment question.[8]

As Judge McMillian pointed out in dissent, the Court of Appeals' failure to remand the case conflicts with the practice followed by that court in the very recent cases of *Nathanson v. United States*, 702 F.2d 162 (8th Cir.

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8. At the time of the filing of the motion for rehearing there were eight regular active judges on the Eighth Circuit. On September 2, 1983, the Honorable Pasco Bowman took office to bring the complement on the Eighth Circuit to nine. Therefore, assuming that all of the regular active judges in office (including Judge Bowman) on the Eighth Circuit on September 15 voted on whether to grant rehearing, the vote was a 5-4 vote.

1983), and *Brockell v. Norton*, 688 F.2d 588 (8th Cir. 1982). In those cases the Eighth Circuit, without engaging in tortuous efforts to decide the First Amendment issues raised therein without remand, refused to examine the speech issues *de novo*. *Nathanson*, supra at 165 ("We, of course, cannot decide the case de novo."); *Brockell*, supra at 593-94 ("We affirm the district court's judgment insofar as it dismisses Brockell's procedural due process claims. We remand, however, for determination of his First Amendment claim and further proceedings consistent with this opinion necessary to that determination."). And, as Judge McMillian further pointed out (714 F.2d at 1438), the decision conflicts with the Second Circuit decision in *McFarlane v. Grasso*, 696 F.2d 217 (2nd Cir. 1982).

Why did the majority opinion in the Eighth Circuit fail to follow the Eighth Circuit's own remand policy expressed and utilized in *Brockell*? Why did the majority opinion fail to follow one of the most basic premises of proper judicial administration within the Federal Court system - namely, that with respect to issues not reached by a District Court, the resolution of which are dependent upon contested fact issues and credibility questions, the proper role of a Court of Appeals is to remand the case to the District Court for the entry of findings of facts?[9]

The majority, from a cold record but with absolute and unequivocal deference to the command structure of the Patrol and its witnesses at every juncture, determined

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9. See also, cases holding that proper appellate judicial procedure is to require a remand to the District Court for consideration of issues not decided by the District Court. *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2nd Cir. 1977); *Hettleman v. Bergland*, 642 F.2d 63 (4th Cir. 1981); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (9th Cir. 1982); and *Markham v. Colonial Mortgage Service Co., Associates, Inc.*, 605 F.2d 566 (D.C. Cir. 1979).

that Petitioner's First Amendment claim, *never* addressed by the District Court because that court held for Petitioner on due process grounds, "border[ed] on the frivolous" and that it would therefore be "unnecessary and would be a waste of judicial resources to remand this case to the district court for a determination of whether the transfer was designed to discipline Hughes for his legitimate investigation of improprieties in Troop 'G,' his surveillance of the Mountain View Airport, or his association with Claud Trieman."

The fallacy of the majority's approach is demonstrated by Judge McMillian's dissent, wherein his review of the evidence, by allowing that the Petitioner and his witnesses *might* be telling the truth, leads inescapably to the conclusion that Petitioner did and does have a substantial, legitimate First Amendment claim. The solution to this tug-of-war, Petitioner submits, was for the court, as the case law uniformly suggests and as the Eighth Circuit had done in *Brockell*, to remand the case to the District Court that *heard* the evidence for a determination.

The inappropriateness and basic unfairness of the Eighth Circuit majority's approach is made clear by a close analysis of some of the factual underpinnings of the case.

The majority, in its *de novo* review of the record, rejected the proposition that Petitioner's corruption-exposing activities (described in the Statement of the Case, supra), qualified the case as a "whistle-blower" case of the ilk of *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979). The majority rejected Petitioner's testimony concerning the cover-up of an arrestee abuse incident. In its *de novo* review, the majority discounted the importance of the incident, stating "Captain McKee could have reasonably reached a different conclusion and was not trying to

cover up something. Lt. Mitchell was unavailable to testify regarding the incident and Captain McKee and Lt. Hickman firmly denied any cover-up of the incident."

The majority opinion in accepting the Patrol's testimony without question, in effect determined that Petitioner's evidence was not credible - a function uniformly and properly held to be within the province of the trial judge who has had the opportunity to observe and judge the credibility of the various witnesses. The District Court in its findings on the due process issues had found the evidence of Petitioner to be credible - *while rejecting contrary testimony of Captain McKee and Lt. Hickman.* Only the trial judge is in a position to make proper credibility determinations on the First Amendment issues. And since the District Court had determined that Captain McKee and Lt. Hickman were not credible on the due process issues, there was a reasonable likelihood that the trial court similarly would have found Captain McKee and Lt. Hickman not to be credible on the First Amendment issues[10] or in a proper situation, if he be in doubt, could have directed further hearing on limited issues.

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10. Subsequent events have *conclusively* demonstrated the lack of credibility of Captain McKee and Lt. Hickman with respect to the prisoner abuse incident. The prisoner involved in this incident filed suit against Captain McKee, Lt. Hickman and the two troopers. See, *Ronald Hicks v. V. P. McKee, et al.*, Case No. 82-3025-CV-S-4, United States District Court for the Western District of Missouri, Southern Division. Counsel for Petitioner have been advised that the two troopers involved in the case maintained their innocence through early discovery stages of that case. Then, faced with the prospect of a Patrol polygraph test, one of the troopers, Archie Dunn, admitted what had transpired. The other trooper (who had been formally charged with the murder of civilians while in service in Vietnam), Bob Lee, maintained his innocence, but failed the polygraph test - and the next day resigned from the Patrol. Dunn was subsequently demoted. Captain McKee and Lt. Hickman shortly thereafter took early retirement. The Missouri Attorney General, realizing there was substance to the prisoner abuse charges, settled the

(Continued on following page)

The Eighth Circuit majority gave lip service to the importance of whistle-blowing activities of public employees, but did not permit the District Court to determine the relevant facts. Instead, the majority rejected the evidence of such by appropriating the District Court's function of making findings where there is conflicting evidence—even though the majority had not had the benefit of having heard and observed the witnesses.

The majority also improperly placed emphasis upon the existence of discord within Troop G. But, as pointed out by the Fifth Circuit in reversing and remanding a denial of relief to police officers in *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982), where police officers sued because they were denied a promotion and the defendants contended that there was such discord that the position was given to someone else:

> "The unrest was a predictable and inevitable result of the request for a hearing [the First Amendment activity]. To hold that the government could permis-

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Footnote continued—

claims against McKee, Hickman and the two troopers by causing approximately $77,000.00 to be paid from the State's tort defense fund to Hicks. In Appendix I we have set forth in detail excerpts from depositions in the *Hicks* case that leave no doubt about the cover-up - e.g., deposition testimony of Lt. Elmore, in relating a conference with Capt. McKee and Lt. Hickman where Elmore was contending the "official" version was incorrect, quotes Lt. Hickman - "Well, if you want to know what I really think happened, . . . I think they beat the shit out of him." See, Appendix I. Trooper Hughes' "whistle-blowing" can hardly be said to be without substance. Had Hughes not raised the matter, it is doubtful that the situation would have ever been exposed. It is clear that the trial judge (a former Missouri prosecuting attorney who stated without equivocation on the record that he had an extremely high respect for the Patrol) had heard enough from Captain McKee and Lt. Hickman to be able to discern a lack of credibility on their parts. And Judge McMillian, with lengthy experience on the state trial bench in Missouri, obviously was cognizant that the ranking officers of the Patrol were not infallible.

> sibly base an employment decision on that result negates the holding that the speech is protected: it is scant comfort indeed to a public employee considering expression to know that he may not be fired for his expression if he may nevertheless be fired for its inevitable result." 669 F.2d at 987.

And it is "scant comfort" to Hughes to know that he has protected First Amendment rights so that when he exercised those rights he cannot be transferred for doing so - when he is left in the position of being transferred because of the unrest the exercise of those rights created! Just as the Fifth Circuit did in *Bowen*, the case should have been remanded for further consideration by the District Court -

> "These questions . . . are pre-eminently factual and are for decision by the trial judge in the first instance." 669 F.2d at 990.

As the Eighth Circuit implicitly recognized less than a year ago in *Brockell*, supra, an issue of the magnitude of Petitioner's first amendment claim deserves the attention of the trier of fact in the first instance. As Judge McMillian stated in dissent:

> "It must first be emphasized that the district court below did not address Hughes' first amendment cause of action. Therefore, we have no pertinent findings of fact with which to review the first amendment issues raised by Hughes' complaint. The majority points out that the determination of whether conduct is protected by the first amendment is a question of law which appellate courts are qualified to answer without regard to a district court's findings of fact. * * * While it may be true that balancing the government's interests against an employee's inter-

> est is a legal determination, it is a determination which must be rooted in historical fact. * * * The present record contains many disputed facts which can only be resolved on the basis of credibility."

Petitioner respectfully suggests that the Eighth Circuit majority's adamant refusal to remand this case to the trier of fact for determinations on issues not addressed below so far departs from the accepted and usual course of judicial proceedings (the accepted and usual course of remand having been applied in a similar case by the same court only a few months before) warrants an exercise of this Court's power of supervision and the issuance of a writ of certiorari to the lower court.

II.

Certiorari Should Be Granted Because It Is Clear From an Examination of the Record That the Transfer Action Was Instigated and "Set Up" by the Troop G Command Structure to Eliminate Hughes' Whistle-Blowing Activities, and Consequently, Such Transfer Action Violated Hughes' First Amendment Rights.

> " 'Those who manage the delicate institutions of government have a special responsibility to respect the law. Justice Louis D. Brandeis put it in classic words in 1928: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . if the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." ' "[11]

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11. Sirica, John J., *To Set The Record Straight - The Break-in, The Tapes, The Conspirators, The Pardon*, pp. 295-296 (W. W. Norton Co., 1979).

The majority opinion of the Eighth Circuit in its deferential treatment and acceptance of the positions advanced by the command structure of the Missouri State Highway Patrol is not unlike that accorded to the FBI in "pre-Watergate" days. In the eyes of many Missouri citizens, including evidently the Judges Gibson, the Missouri State Highway Patrol can do no wrong - and all inferences must be drawn in favor of its command structure. Judges Wright and McMillian, who have been in the "trenches" as a prosecutor and a state trial judge, respectively, recognized that the Patrol is fallible. Just as it was virtually impossible before Watergate for excesses and cover ups within higher levels of the FBI to be questioned, we see reflected at the state level a similar problem in this case.

It is quite clear that there were a number of things amiss in Troop G at Willow Springs - matters that Capt. McKee, Lt. Hickman and Lt. Elmore did not want to be further explored by Hughes. It is further clear that Petitioner Hughes was a "good trooper" (the words of Respondent's counsel at trial), and that if Hughes was to be faulted for any of his actions, the fault was that he didn't close his eyes to some matters that were transpiring. Or as Elmore had put it in one of his earlier personnel evaluation reports of Hughes - "he [Hughes] doesn't seem to understand that the law needs to be bent a little at times." (P. Exh. 24). Plainly and simply Hughes *should* have been commended by the Respondent for having the guts to raise questions about what was going on in Troop G at Willow Springs. Instead, he finds himself being ordered transferred to the "Siberia" of the Patrol on the basis of paperwork (of which he is not made aware) which indicates that the recommended transfer is a "disciplinary action." Certainly Hughes met all of the requirements of *Pickering v. Board of Education*, 391 U.S. 563 (1968) to

show his entitlement to injunctive[12] relief on First Amendment grounds by showing that his constitutionally protected conduct played a "substantial" role in the Patrol's transfer decision. And the Patrol did not show by a preponderance of the evidence that "it would have reached the same decision" on the adverse employee action "in the absence of the protected conduct." *Egger v. Phillips*, 669 F.2d 497, 502 (7th Cir. 1982). (Egger, an FBI agent, challenged his ordered transfer from Indianapolis to Chicago, and it appeared that some discord had occurred in Indianapolis because of misconduct charges Egger had made against another agent; Court of Appeals rejected the District Court's reasoning that the FBI was a paramilitary organization so that different standards applied and the judgment for the defendant was reversed and the case remanded for the District Court to weigh the evidence on the First Amendment issues.)

The result here on the First Amendment issue is, we submit, contrary to a number of cases from other Circuits, as well as of the Eighth Circuit itself. See, e.g., *Ruhlman v. Hankinson*, 461 F.Supp. 145 (W. D. Pa. 1978), affm'd 605 F.2d 1197 (3rd Cir. 1979), cert. denied 445 U.S. 911 (relief granted on First Amendment basis to State Police sergeant who was transferred from Franklin to Erie, Pa., because he counseled other officers to question quota arrest system); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (policeman granted relief with respect to discipline imposed for "going public" with respect to wrongdoing by other officers when the command structure took no action); *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979) (relief granted disciplined employee for writing and distributing a letter which alleged misconduct of other em-

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12. Petitioner Hughes sought injunctive relief, *not* damages, from the Respondent.

ployees); *Bernasconi v. Tempe Elementary School Dt. No. 3*, 548 F.2d 857 (9th Cir. 1977), cert. denied 434 U.S. 825 (enjoining involuntary transfer of teacher from one school to another school); *Rosado v. Santiago*, 562 F.2d 114 (1st Cir. 1977) (relief granted social worker transferred from one town to another after she wrote letter suggesting irregularities in food stamp program); and *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978) (per Lay, J.), cert. denied 443 U.S. 911 (1979) (assignment of Little Rock police officer to a different assignment after officer had talked with attorney who was involved in case involving abuse to criminal defendants - reassignment to original position ordered by court).

III.

Certiorari Should Be Granted Because Petitioner Had a Legally Protectable Right So As to Be Entitled to a Due Process Hearing With Respect to the Ordered Transfer From Troop G to Troop C.

The District Court properly viewed the ordered transfer as punitive in nature and interpreted state law and regulations as requiring a hearing in such instance.[13] And Major (now Superintendent) Hoffman testified:

"Q. Okay. Now on a disciplinary move - if you actually come out and call it a disciplinary move, then there is a right to a hearing, a right to re-

13. A full argument on the interpretation of Missouri law and the Patrol General Order should properly await the Brief on the merits. Suffice it to say at this juncture that (1) the interpretation by the District Court was a reasonable and proper interpretation of Missouri law and regulations and (2) the Court of Appeals departed from established practice by not deferring to the District Judge on an interpretation of Missouri law [see, e.g., *Jump v. Goldenhersh*, 619 F.2d 11 (8th Cir. 1980)].

view, a number of rights that the subject man has; isn't that true, Major?

A. Yes, sir." (Tr. 235)[14]

Here, the report initiating the transfer order was entitled "Disciplinary Action," all of the top command structure at Troop G had complained of the "actions" of Hughes, and the Respondent concluded in his approval of the recommended transfer that because of "Trooper Hughes' actions . . . a strong corrective measure must be taken." (Appendix E). One can only conclude that the action was punitive in nature.

Whether the interests of Petitioner be characterized as a property interest or a liberty interest, or whether emphasis be placed upon the "stigma" arising from the situation, Petitioner had such a legally protectable interest as to be entitled as a matter of procedural due process to at least a rudimentary hearing in connection with the involuntary transfer from Troop G to Troop C. If an inmate in a Pennsylvania penitentiary has a "liberty" interest which invokes due process considerations so that he may not be transferred from the general prison population to administrative segregation without a "hearing" of some type - *Hewitt v. Helms*, 103 S.Ct. 864 (1983) - then surely Hughes has a cognizable right under the circumstances here which would invoke a due process hearing requirement in connection with the ordered transfer. All of the following factors, viewed in a totality, gave rise to such a right:

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14. The Patrol practice of granting a board hearing when a disciplinary or punitive transfer is proposed is reflected in the proceedings with respect to Cpl. Eddie Hill which are set forth in Appendix H to this Petition.

1. The transfer was not made to remedy any imbalance between the troop strengths.

2. Petitioner's special skills were not needed at Troop C.

3. Troop assignments within the Missouri State Highway Patrol are generally of a long term nature, and changes are usually only made when promotions are involved, a move is requested by the member, or for disciplinary reasons.

4. The transfer was ordered to the "Siberia" of the Patrol insofar as rural troopers such as Petitioner were concerned.

5. A rapid, involuntary transfer, as here, is generally regarded by other members of the Patrol as disciplinary in nature so that a stigma attaches by means of such transfer.

6. The order transferring Petitioner was disseminated by the State Highway Patrol command structure.

7. Persons in the Patrol, others engaged in law enforcement and persons from the local community testified that the move was considered as disciplinary with a stigma attached - i.e., that Hughes had done something wrong and was being punished.

8. Established practice within the Patrol is for there to be a board hearing if a disciplinary transfer is imposed, and a member of the Patrol comes to reasonably expect that.

9. Petitioner Hughes had an established home in Willow Springs which he and his wife owned, his

children have been in High School there, and the move to Troop C would result in financial losses to Petitioner.

10. For one who has aspired to higher positions within the Patrol, the stigma attached to an involuntary transfer such as here is particularly onerous.

The totality of these circumstances reflects an interest of Hughes which is legally cognizable so that the due process clause requires, as the District Court found, that Petitioner be granted a hearing; and having not been afforded such a hearing, Petitioner may not be properly ordered transferred and therefore be arbitrarily deprived of such legally cognizable interest. *Perry v. Sinderman*, 408 U.S. 593 (1972); and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). And see, *Bottcher v. State of Florida Department of Agriculture and Consumer Services*, 361 F.Supp. 1123 (N. D. Fla. 1973), aff'd 503 F.2d 1401 (5th Cir. 1974), reh. denied 510 F.2d 384 (5th Cir. 1975) (assignment of state employee from a position at one laboratory to another laboratory coupled with stigma attached thereto held to be an interest subject to procedural due process protections).

CONCLUSION

One cannot, we submit, review the facts of this case without coming to the conclusions that it raises substantial First Amendment and procedural due process questions, but also, and perhaps even more importantly in the context of why this case should be heard by the Supreme Court, it raises the questions of the proper procedures that a Court of Appeals should follow in deciding such issues when they were not reached by the District Court, the standard of review to be followed by a Court of Appeals in the review of such issues, and the deference that should be paid to the District Court on disputed fact issues and the interpretation of state law. Petitioner respectfully requests that a Writ of Certiorari be issued and that this cause be heard by the Supreme Court.

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83 - 793

No.

In the Supreme Court of the United States

October Term, 1983

WILLIAM E. HUGHES,
Petitioner,

vs.

ALAN S. WHITMER, Superintendent, Missouri State Highway Patrol,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

APPENDIX

APPENDIX A

William E. HUGHES, Appellee,

v.

Alan S. WHITMER, Appellant.

Nos. 82-1338 and 82-1538.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 14, 1982.

Decided Aug. 4, 1983.

Rehearing and Rehearing En Banc
Denied Sept. 15, 1983.

Member of the Missouri State Highway Patrol brought action for injunctive relief against a transfer from one troop to another. After a bench trial, the United States District Court for the Western District of Missouri, Scott O. Wright, J., 537 F.Supp. 93, granted injunctive relief. Appeal was taken. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that: (1) the Missouri highway patrol member had no protectable property or liberty interest in a predisciplinary hearing before he was transferred to another troop; (2) even if the transfer was related to the member's speech activity, the patrol established a substantial interest in maintaining morale which outweighed the dissension-causing, speech-related activities; (3) the member's activities did not amount to "whistle-blowing"; and (4) the member failed to establish that he was transferred as the result of his off-duty First Amendment contacts with another.

Judgment reversed.

McMillian, Circuit Judge, concurred in part and dissented in part with opinion.

* * *

John Ashcroft, Atty. Gen., Preston Dean, Asst. Atty. Gen., Jefferson City, Mo., for appellant.

Alex Bartlett, Roger K. Toppins, Bartlett, Venters & Peltz, P.C., Jefferson City, Mo., R. Jack Garrett, R. David Ray, Law Offices of R. Jack Garrett, West Plains, Mo., for appellee.

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

The Superintendent of the Missouri Highway Patrol (Superintendent)[1] appeals from a final judgment entered in the District Court for the Western District of Missouri permanently enjoining the Missouri Highway Patrol (Patrol) from transferring appellee Trooper William E. Hughes without first providing him with a due process name-clearing hearing. For reversal, the Superintendent argues that Trooper Hughes' transfer from a rural troop to an urban troop did not violate Hughes' fourteenth amendment rights because Hughes has no property or liberty interest in a particular geographic assignment within the Patrol. Although the district court did not specifically address Hughes' first amendment claim, Hughes urges on appeal that his first amendment rights were violated because the transfer was ordered to retaliate against him for

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1. During the relevant events leading to this lawsuit, Alan Whitmer was the Superintendent of the Missouri Highway Patrol. After the district court issued its opinion, Howard Hoffman became the Superintendent.

his protected speech-related activities. For the reasons discussed below, we reverse the district court's judgment. 537 F.Supp. 93.

I. *Factual Background*

Trooper Hughes has been a member of the Patrol since 1970 and has spent almost all of his career assigned to Troop "G." Troop "G" is headquartered in Willow Springs, Missouri, and its members patrol the highways in the surrounding nine counties of south central Missouri. Hughes and his family have lived in Willow Springs during Hughes' ten-year tenure in Troop "G."

On Friday afternoon, October 16, 1981, Hughes was summoned to Troop "G" headquarters. When he arrived, Hughes was ushered into Captain McKee's office and told by Major Hoffman of Patrol headquarters that he was being transferred to Troop "C," at state expense, effective Monday, October 19, 1981. Troop "C" is a relatively urban assignment encompassing the counties surrounding the City of St. Louis. Its headquarters are in Kirkwood, Missouri, which is some 200 miles from Willow Springs.

Hughes reported for duty at Troop "C" on Monday, October 19, 1981, as ordered. Hughes was never notified officially of any complaint against him prior to the Superintendent's decision to order the transfer. Nor was Hughes given an opportunity to meet any of the charges against him or refute any of the factors which entered into the Superintendent's decision to transfer him. Hughes still has not received written reasons for his transfer. His transfer order merely states that he is being transferred at state expense from Troop "G" to Troop "C" effective October 19, 1981.

Superintendent Whitmer, the ultimate transferring authority, Major Hoffman, whom the Superintendent ulti-

mately relied upon in making the transfer decision, and Captain McKee of Troop "G" testified that the transfer was made to resolve a debilitating troop morale problem resulting from an intense personality dispute between Hughes and Lt. Elmore. Lt. Elmore was in charge of staff functions at Troop "G" headquarters but was not in the chain of command over Hughes.

Major Hoffman, who conducted interviews with a number of Troop "G" patrolmen, concluded that the major source of the friction between Hughes and Elmore was Hughes' investigation of Elmore's twenty-four-year-old son. Hughes suspected that Elmore's son was involved in illicit drug trafficking. Hughes reported these suspicions to Captain McKee, who in turn told Hughes to continue the investigation. As Hughes continued his investigation, he suspected that Lt. Elmore was leaking information about the investigation to his son. Hughes apparently told other Troop "G" officers about his suspicions regarding Lt. Elmore and made accusations regarding Elmore's son's involvement in drug activities. Hughes also told a Willow Springs neighbor that the neighbor's sixteen-year-old daughter had been seen at Lt. Elmore's house with Elmore's son. Elmore's son was married to another woman at the time. During their interviews with Hoffman, various Troop "G" officers expressed the view that Hughes had become too personally involved in Elmore's family affairs, hindering his own job performance and causing disharmony within the Troop. After learning about Hughes' various investigations and accusations, Lt. Elmore reciprocated by conducting his own investigation of Hughes and by indicating his intention to file a defamation of character suit against Hughes.

At trial Hughes testified that he was transfered in retaliation for the Elmore investigation and his various other

investigations. One of these other investigations involved the Mountain View Airport. Hughes was approached by three Mountain View citizens with information about suspicious late night airplane landings and take-offs on a remote segment of the airport's runway. Hughes testified that he received information that a pilot had been offered a large sum of money to fly drugs in and out of the Mountain View Airport. Hughes passed this information to Captain McKee, who encouraged Hughes to conduct a surveillance at the airport. Later, a state representative whose plane was housed at the Mountain View Airport complained about Hughes' surveillance to Superintendent Whitmer. Despite this complaint, Captain McKee encouraged Hughes to continue the investigation and, at Hughes' request, placed a call to Jefferson City for special night surveillance equipment to aid in identifying the airplanes making night flights. Hughes testified that soon after he made the request for surveillance equipment, the suspicious night flights ceased. Hughes never again requested or received the night surveillance equipment. Hughes testified that he spent an entire year on his airport surveillance without finding any tangible evidence of impropriety.

Hughes also testified that he had received information that Captain McKee was involved in a ticket-fixing incident some six years ago. Captain McKee denied having ever fixed any traffic ticket. Hughes also testified that he had received information that Captain McKee and Lt. Hickman were involved in a cover-up of a prisoner abuse incident. Hughes referred to a report written by Trooper Mitchell and Sergeant Zorsch indicating that an officer had allegedly struck an arrestee. Captain McKee allegedly concealed this report and, after interviewing the officer involved in the alleged beating, collaborated with Lt. Hickman in writing another report discrediting the arrestee's

allegations. Sergeant Zorsch testified that while he believed some of the arrestee's allegations were true, Captain McKee could have reasonably reached a different conclusion and was not trying to cover up something.

Hughes testified that he told his wealthy industrialist friend, Claud Trieman, a member of the Governor's Crime Commission, about the alleged ticket fixing and prisoner abuse incidents.[2] Hughes did so in the hope that his friend could intercede with the higher echelon at Patrol headquarters, to initiate some reform in Troop "G." Superintendent Whitmer and Major Hoffman testified that they were completely unaware of Hughes' suspicions of improprieties in Troop "G." Hughes testified that he never told Hoffman or anybody else within the Patrol's command staff about his suspicions.

Over the past few years Hughes also became involved in other incidents of some concern to the community and to his fellow officers. In 1977, while patrolling a wooded area, Hughes discovered two teachers engaged in a "compromising assignation." Hughes, while off-duty, reported this encounter to the school board. In 1979, Hughes was reprimanded for openly accusing a local postal employee of slashing the tires of Hughes' car without sufficient evidence to support his accusations. These accusations were made while Hughes was off-duty. Hughes was also criticized by some of his fellow officers for spending too much time patrolling the Mountain View area so that he could associate with his wealthy industrialist friend, Claud Trieman, while on duty and for filing baseless written reports accusing radio operators of dereliction of duty. Finally, some officers, including Lt. Hickman and Captain

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2. Hughes also enlisted the aid of this friend in Hughes' unsuccessful bid to become Superintendent of the Patrol. Major Hoffman became and is now the Superintendent of the Patrol.

McKee, suspected that Hughes furnished a local sheriff with a copy of a Patrol investigation of the sheriff's alleged involvement in a timber theft.

On October 3, 1981, Lt. Elmore met with Superintendent Whitmer and suggested that Hughes be transferred to Troop "C." Superintendent Whitmer testified, however, that no decision concerning Hughes was reached at this meeting. It is unclear from the record when the decision to transfer Hughes was actually reached. Superintendent Whitmer was uncertain about the exact date, but surmised it was Thursday, October 15, 1981. Major Hoffman testified that the decision was made the morning of October 16, 1981, the day Hughes was told of the decision.

In any event, on October 4, Elmore returned to Troop "G" and told several troopers that he was having Hughes transferred to Troop "C." Dissension then began to mount in Troop "G" as troopers took sides over the rumored transfer of Hughes. Around October 7, Captain McKee testified that he reported this dissension to Major Hoffman. Major Hoffman then investigated the matter, interviewed a number of Troop "G" officers, and wrote a report, dated October 13, 1981, in which he concluded that there was a serious morale problem in Troop "G" because of the conflict between Lt. Elmore and Trooper Hughes. Major Hoffman recommended that both Elmore and Hughes be transferred to correct the situation.

Almost simultaneously with Major Hoffman's investigation, Lt. Elmore wrote his own memorandum entitled "Disciplinary Action—Trooper W.E. Hughes." In this memorandum Elmore stated that Hughes had caused Troop "G" to lose its effectiveness because of Hughes' "seemingly uncontrollable actions" and recommended that Hughes be transferred. These "uncontrollable actions" in-

cluded Hughes' investigation of Elmore's son, Hughes' close relationship with Claud Trieman, and Hughes' "actions toward other public and private individuals."

Lt. Hickman added his own remarks to Lt. Elmore's memorandum and also recommended Hughes' transfer. Hickman noted that Hughes never consulted him regarding the investigation of Elmore's son and that Hughes was spending too much of his time patrolling the Mountain View area, where an officer was already stationed. Hickman added his suspicion, that Hughes had given a local sheriff a copy of a Patrol investigation report concerning the sheriff.

Captain McKee also attached his remarks to this memorandum, suggesting that because the intense bitterness between Hughes and Elmore was disrupting the entire troop, Hughes should be transferred at state expense to another troop. McKee also noted Hughes' various "controversial actions," including his report about the two school teachers, his foundless accusations that a fellow resident had slashed Hughes' car tires, and his on-the-job association with Claud Trieman in the Mountain View area who allegedly was to help Hughes in his bid to become Superintendent. McKee also wrote another report in which he recommended that Lt. Elmore also be transferred because he had contributed to dissension in Troop "G."

Superintendent Whitmer endorsed the reports written by Major Hoffman and Captain McKee. Whitmer also signed the memorandum that included the recommendations of Lt. Elmore, Lt. Hickman, and Captain McKee. Whitmer, believing that both Hughes and Elmore had contributed to dissension in the troop, transferred Hughes to Troop "C," effective October 19, 1981, and transferred Lt. Elmore to Troop "D," effective November 1, 1981. Hughes

was offered moving expenses and was provided the same job status and pay in Troop "C" as he had enjoyed in Troop "G."

Two weeks after the transfer decision, Hughes filed this § 1983 suit in federal district court claiming that the state's failure to provide him with a name-clearing hearing violated his substantive and procedural fourteenth amendment due process rights as well as his right to equal protection. U.S. Const. Amend. XIV. Hughes also alleged that he was transferred in retaliation for exercising his first amendment rights. The district court held that Hughes' transfer was disciplinary and, therefore, under Missouri law, Hughes was entitled to a due process hearing before he could be transferred. The district court enjoined the Patrol's order transferring Hughes to Troop "C" until the Patrol provides Hughes with a hearing. This appeal ensued.

II. *Due Process*

The district court below believed that the dispositive issue in this case was whether or not Hughes' transfer was disciplinary. For if it was disciplinary, the district court reasoned, Mo.Rev.Stat. § 43.120, .150 (1978) and Patrol General Order V-16-104 require that a hearing be held before the disciplinary action can be carried out. This analysis would have been correct if the district court had been sitting in a diversity case governed by Missouri law. But Hughes brought suit under 42 U.S.C. § 1983 (1976) alleging that he was deprived of his fourteenth amendment right to due process under color of state law. The necessary predicate to such a suit is establishing that the plaintiff had a legitimate claim of entitlement to an identifiable property or liberty interest.[3] *Board of Regents*

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3. Both parties stipulated that Superintendent Whitmer acted under color of state law in ordering Hughes' transfer.

v. Roth, 408 U.S. 564, 571, 577, 92 S.Ct. 2701, 2706, 2709, 33 L.Ed.2d 548 (1972); *Brockell v. Norton,* 688 F.2d 588, 590-91 (8th Cir.1982). Hughes' brief on appeal and the district court's opinion below, however, do not identify any liberty or property interest to which Hughes was legitimately entitled under state law.

A. *Property*

For Hughes to have a due process property interest in his assignment to Troop "G," he must identify some rule or mutually explicit understanding that supports his claim of entitlement to a Troop "G" assignment, and that he may invoke at a hearing. *Perry v. Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972). A clause in a written contract guaranteeing a trooper's preferred assignment would be the classical way of showing a mutually explicit understanding. *Id.* But Hughes offered no evidence that he has a contract with the Patrol. A statute or agency regulation may also provide the basis of a mutually explicit understanding. *Bishop v. Wood,* 426 U.S. 341, 344-45, 96 S.Ct. 2074, 2077-2078, 48 L.Ed.2d 684 (1976). The pertinent Missouri statutes, however, only guarantee that a trooper will not be dismissed from the Patrol absent "cause." While this language may support Hughes' claim of entitlement to continued employment with the Patrol, *see Bishop v. Wood,* 426 U.S. at 345 & n. 8, 96 S.Ct. at 2078 & n. 8, it does not guarantee Hughes the indefeasible right to remain in a particular troop within the Patrol. *Arnett v. Kennedy,* 416 U.S. 134, 151-52, 94 S.Ct. 1633, 1642-1643, 40 L.Ed.2d 15 (1974). To the contrary, Mo.Rev.Stat. § 43.120(1) (1978) empowers the Superintendent of the Patrol to "assign members of the patrol to such districts in the manner he deems proper . . . . He shall have authority in his discretion to call members of the patrol from one district to another." In

reviewing a similar statutory scheme, the Seventh Circuit concluded that a Chicago police officer had no property interest in a particular geographic assignment because the applicable Illinois statute protecting police officers from adverse action without cause was limited by its own terms to discharges and suspensions. *Confederation of Police v. Chicago*, 547 F.2d 375, 376 (7th Cir.1977). Similarly, Mo.Rev.Stat. § 43.150 is limited by its own terms to dismissals. Therefore, we hold that applicable Missouri statutes and Patrol general orders do not support Hughes' claim that he has a property interest in his assignment to Troop "G."[4]

A property interest also may be manifested by an employer's historical practices and conduct which rise to the level of a "common law" of the employment relationship that *both* parties recognize as establishing their respective rights and responsibilities. *Perry v. Sindermann*, 408 U.S. at 602, 92 S.Ct. at 2700. An employee's unilateral expectations spawned by the regularized practices of his employer will not do. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Here, a Missouri statute specifically gives the Superintendent the power to transfer troopers at his discretion. Additionally, Hughes was told at the Patrol Academy that he was subject to transfer anywhere in the state, with or without cause. The Missouri statute, coupled with the Patrol's practice of telling all new troopers that they can be transferred at will, negates a finding that there is a *mutually* explicit understanding between the Patrol and its members that a trooper is entitled to a permanent assignment that is indefeasible except for cause. *Perry v. Sindermann*, 408 U.S. at 602 & n. 7, 92 S.Ct. at 2700 & n. 7. Hughes, therefore, has no due process property interest in his assignment to Troop "G." At best, he

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4. *See* discussion *infra* at A11-A12.

has exhibited an unilateral hope of permanent residence in Willow Springs.

B. *Stigma, Liberty and the Right to a Name-Clearing Hearing*

Hughes does not contend, and the district court did not find, that Hughes has a liberty interest in being assigned to Troop "G." Rather, what the district court decided and what Hughes argues on appeal is that, under Missouri law, the Patrol must give him a hearing before any disciplinary action can be taken against him. Therefore, the Patrol's failure to provide him with a hearing violated his constitutional rights as protected by § 1983. *Hughes v. Whitmer*, 537 F.Supp. 93, 97 (W.D.Mo.1982). We disagree both with the premises and the conclusions inherent in Hughes' argument.

1. *Right to a Pre-Disciplinary Transfer Hearing Under Missouri Law*

The district court below ruled that, as Mo.Rev.Stat. § 43.120, .150 and Missouri Highway Patrol General Order V-16-104 "make manifest, any member of the Patrol who is confronted with the threat of disciplinary action is entitled to written notification of the charges against him, a hearing before a disciplinary board, and an appeal to the Superintendent of any disciplinary action taken by the board." *Hughes v. Whitmer*, 537 F.Supp. at 95. There are no Missouri cases interpreting Mo.Rev.Stat. § 43.120, 150 or Patrol General Order V-16-104 that are on point.[5]

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5. Where there is no state court precedent, ordinarily we will give substantial weight to the interpretation of the district court judge who sits in the *lex loci* state. *Bishop v. Wood*, 426 U.S. 341, 345-46, 96 S.Ct. 2074, 2077-78, 48 L.Ed.2d 684 (1976). But, because the parties have an equal right to have questions of state law reviewed on appeal, we are not bound by the district court's interpretation, or to a clearly erroneous standard of review. *Luke v. American Family Mut. Ins. Co.*, 476 F.2d 1015, 1019 & n. 6 (8th Cir. 1973).

Section 43.120 of the Missouri Revised Statutes gives the Superintendent of the Patrol broad authority and discretion to prescribe rules for disciplining Patrol members. Where the Superintendent seeks to dismiss a trooper, however, his discretion is limited by Mo.Rev.Stat. § 43.150. Section 43.150 provides that after a one-year probationary period, members of the Patrol are

> subject to removal only for cause after a formal charge has been filed in writing before or by the superintendent and upon a finding by a majority of a board of five members. . . . Within thirty days after the petition is filed, the board shall conduct a hearing and report to the superintendent the finding by the majority of the board, whether the charges are true and if sufficiently serious to warrant removal . . . . [M]embers of the patrol . . . shall be subject to dismissal as provided or such lighter punishment as suspension . . . fine, reduction in rank, forfeiture of pay, or otherwise as the superintendent may adjudge.

Section 43.150, by its own terms, requires a showing of cause after a formal hearing only when a trooper's removal is sought. Under Missouri rules of statutory construction, the express mention of one thing (removal for cause in this case) implies the exclusion of all other things (in this case disciplinary transfers). *Harrison v. MFA Mutual Insurance Co.*, 607 S.W.2d 137, 146 (Mo. 1980) (banc); *Giloti v. Hamm-Singer Corp.*, 396 S.W.2d 711, 713 (Mo.1965). If the Missouri legislature had intended to require the Superintendent to show cause before taking any other type, or all other types, of disciplinary action, it would have been a simple matter to have done so by stating that non-probationary troopers "are subject to disciplinary action for cause." *De Poortere v. Commercial Credit Corp.*, 500 S.W.2d 724, 727 (Mo.App.1973). The Statute, however, only mentions one type of disciplinary action—"removal."

This interpretation is butressed by the Patrol's General Order V-16-104 issued on February 20, 1975. It is divided into seven major sections. The first quotes relevant statutory authority, including § 43.120, .150. Section II provides procedures for processing general complaints against Patrol members.[6] Section III deals with a supervisory officer's responsibility and authority to discipline subordinates.[7] Section IV gives the disciplined trooper the right to appeal the disciplinary action to the superintendent.

None of these sections grants a trooper a due process hearing before disciplinary action short of dismissal may be

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6. Whenever a troop commander receives an accusation that someone under his command has violated a law, rule, regulation, or order, Section II requires him to appoint an investigator. The investigator has the responsibility of contacting the complainant in person and forwarding a complete written report through channels to the superintendent. The report must classify the complaint as either: Unfounded, Exonerated, Not Substantiated, or Substantiated. The superintendent then determines what disciplinary action, if any, will be taken. The accused trooper is to be advised of the complaint against him and *may be* directed to give his written version of the facts. After the trooper is advised of the nature of the disciplinary action, he may appeal under Section IV of the General Order.

7. Section IIIA gives supervisory personnel the responsibility of disciplining subordinates within the supervisor's direct line of command. If, after investigating the incident, the supervising officer feels that the penalty to be recommended or assessed is more serious than an oral reprimand, he must make a report through channels. Under Section IIIB, if the supervisory officer is a corporal or above, he may make an oral reprimand or impose an emergency suspension for the remainder of the accused trooper's tour of duty. If the supervisory officer is a sergeant or above he may assess a fine up to $50.00 or recommend a disciplinary transfer, suspension up to 30 days, or dismissal. If the supervisory officer is troop commander or above, he may accept the trooper's written resignation and "take immediate steps toward terminating an employee if the employee desires to tender his resignation rather than submit to further investigation and a hearing." or file formal charges. Short of dismissal, or filing of formal charges, a troop commander or above need only inform the effected trooper of the nature of the disciplinary action before imposing it.

assessed against him. The only section which does afford a trooper a pre-disciplinary hearing is Section V. Section V requires a pre-disciplinary hearing whenever formal charges are brought against a member of the Patrol. Formal charges are prepared, however, only "when a violation is of such a nature that dismissal may be the outcome." General Order V-16-104, § V(A). Therefore, under the disciplinary procedures outlined in the General Order, a trooper may demand a formal hearing only when the Patrol recommends removal. In fact, in enforcing § 43.120, .150, the Patrol has never given a trooper a pre-disciplinary transfer hearing when the trooper's dismissal was not sought. Absent a prior judicial construction of the statute, this interpretation of the statute by the administrative agency charged with the responsibility of enforcing it, will be given considerable weight. *Smith Beverage Co. v. Reiss,* 568 S.W.2d 61, 67-68 (Mo.1978) (banc); *Foremost-McKesson, Inc. v. Davis,* 488 S.W.2d 193, 197 (1972) (Mo. banc). *See also Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 565, 100 S.Ct. 790, 796-797, 63 L.Ed.2d 22 (1980); *Dymond v. United States Postal Service,* 670 F.2d 93, 96 (8th Cir. 1982). Accordingly, we conclude that under Missouri law, a member of the Patrol has no protectable interest in a predisciplinary hearing unless the member's removal is recommended or the member is accused of a violation that is of such a nature that dismissal may be the outcome. Thus, because the fourteenth amendment does not create due process property or liberty interests apart from those protected under state law, Hughes has not proven a violation of his fourteenth amendment rights. *Roth,* 408 U.S. at 578-79, 92 S.Ct. at 2709-2710.

2. *Stigma and Liberty*

At trial, Hughes presented evidence that his transfer stigmatized him in the eyes of both his peers in the Patrol and his neighbors in the Willow Springs community. In effect, Hughes argues that this stigma adversely affected his liberty interest in his reputation and also his ability to gain promotion within the Patrol. Therefore, Hughes claims that his transfer without a hearing deprived him of liberty without due process of law in violation of the fourteenth amendment.

To prevail, Hughes must show more than an injury to his reputation caused "by what the government is doing to him." *See Wisconsin v. Constantineau,* 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). Under the Supreme Court's decision in *Paul v. Davis,* 424 U.S. 693, 708, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976), the offending state action must deprive the stigmatized person of a right to a benefit previously held under state law. Even if we assume for the sake of argument that Hughes' transfer publically communicated the impression that Hughes had committed a serious infraction, we conclude that Hughes has failed to show some change of legal status that occurred in conjunction with the release of the stigmatizing information.

The theoretical foundations of *Paul v. Davis's* "change in legal status" requirement are unclear. But whether legal status serves as a tangible benchmark of a liberty deprivation serious enough to merit federal due process protection, or it is a reflection of a state's protection of some interest beyond a common law tort cause of action for damages, the Supreme Court has ruled that without a change of legal status, a stigmatized public employee's cause of action is simply one for defamation under state

law and is for the state courts to entertain.[8] *See Meachum v. Fano*, 427 U.S. 215, 226, 228-29, 96 S.Ct. 2532, 2539, 2540-2541, 49 L.Ed.2d 451 (1976). Thus, the Court has made it clear that the constitution does not require the government to give to its stigmatized employee a hearing if the public employee remains a public employee. *See Paul v. Davis*, 424 U.S. at 710, 96 S.Ct. at 1164-1165. Several Courts of Appeals have held that a public employee's failure to be promoted[9] or internal transfer does not implicate a due process liberty interest as envisioned by *Paul v. Davis*, *See, e.g., Blevins v. Plummer*, 613 F.2d 767, 768 (9th Cir. 1980) (promotion); *Moore v. Otero*, 557 F.2d 435, 438 (5th Cir.1977) (transfer); *Sullivan v. Brown*, 544 F.2d 279, 283 (6th Cir.1976) (transfer). We agree and hold that the "internal transfer of an employee, unless it constitutes such a change of status as to be regarded essentially as a loss of employment, does not provide the additional loss of a tangible interest necessary to give rise to a liberty interest meriting protection under the due process clause of the fourteenth amendment." *Moore v. Otero*, 557 F.2d at 438.

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8. The district court below was of the opinion that 42 U.S.C. § 1983 gave it jurisdiction to enforce state law personnel procedures, *citing Doe v. Hampton*, 566 F.2d 265, 271-72 (D.C. Cir.1977) and *Villareal v. EEOC*, No. 80-0992 CVW2, Adopted Magistrate's Report and Recommendation Denying Plaintiff's Motion for Preliminary Injunction at 8-9 (W.D.Mo. July 20, 1981). The district court's reliance on these two cases is misplaced. Both *Hampton* and *Villareal* were cases brought under the court's general federal question jurisdiction, 28 U.S.C. § 1331 to adjudicate the plaintiff's rights under federal civil service laws. *See, e.g.*, 5 U.S.C. §§ 706(2)(E), 7502-03, 7510, 7512-13, 2302; 5 C.F.R. § 771.307(b) (1977). Without an identifiable fourteenth amendment liberty or property interest, a federal court has no jurisdiction under 42 U.S.C. § 1983 to enforce state employee procedural rights that are created by state law.

9. Evidence was adduced at trial that at least one other trooper who had received a disciplinary transfer had been promoted after he was transferred.

III. *First Amendment*

Having granted the injunction on due process grounds, the district court did not explore Hughes' claim that his transfer was an unconstitutional reprisal against him for the exercise of his first amendment rights. Even though the fourteenth amendment does not create any protectable interests, it does protect interests derived from independent sources—such as the first amendment. *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); *Brockell v. Norton*, 688 F.2d 588, 592 & n. 7 (8th Cir.1982). The first amendment restrains the government from retaliating against a public employee on the basis of the employee's speech or associations. *Perry v. Sindermann*, 408 U.S. at 593, 92 S.Ct. at 2694; *see Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-84, 97 C.Ct. 568, 574-575, 50 L.Ed.2d 471 (1977). In this case, the record before us is sufficient to dispose of Hughes' claim that he was retaliated against for exercising his first amendment rights.

First, the evidence clearly shows that the transfer was designed to resolve a substantial and debilitating morale problem in Troop "G." The Superintendent's determination that Hughes' conduct contributed to the morale problem was rational and, even though the transfer may have been indirectly traceable to Hughes' arguably speech-related investigation of Elmore's son, we nevertheless view the transfer as a reasonable nonpunitive and nondiscriminatory means of achieving the Patrol's significant interest in maintaining discipline and harmony. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-1735, 20 L.Ed.2d 811 (1968); *Kelley v. Johnson*, 425 U.S. 238, 246-47, 96 S.Ct. 1440, 1445-1446, 47 L.Ed.2d 708 (1976). The Superintendent has the statutory authority to transfer personnel and is also charged with the overall operation of the Patrol,

which is basically a paramilitary organization. The courts under our constitutional tripartite division of powers lack the right to transfer personnel in administrative or executive functions. The courts are not only ill-equipped to administer governmental functions that properly belong to the executive branch but were not set up for that purpose; neither should the courts attempt collaterally to influence executive functions by specifying when, where, and why certain individuals should or should not be transferred.[10]

Second, the record clearly shows that the transfer was not attributable to Hughes' legitimate whistle-blowing activities concerning alleged corruption in Troop "G," his surveillance of the Mountain View Airport, or his "political" association with Claud Trieman.

A. *The Pickering Balance*

While government employees do not relinquish their first amendment rights when they enter public service, those rights, unlike the rights of the citizenry-at-large, are subject to the state's paramount interest in promoting the efficiency of the public services it performs through its employees. *Rosado v. Santiago*, 562 F.2d 114, 117 (1st Cir.1977); *Santos v. Miami Region, U.S. Customs Service*, 642 F.2d 21, 25 (1st Cir.1981). As the Supreme Court emphasized in *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-1735, 20 L.Ed.2d 811 (1968), "the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech

10. As noted by the Supreme Court in *Bishop v. Wood*, 426 U.S. 341, 349, 96 S.Ct. 2074, 2079-2080, 48 L.Ed.2d 684 (1975) "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."

of the citizenry in general." Accordingly, public employers may legitimately curtail the speech activities of their employees to promote efficiency, loyalty, and departmental morale, provided these interests outweigh the employees' speech interest. *Id.* Therefore, in determining whether the transfer here infringed Hughes' first amendment rights, our duty as enunciated by the Court in *Pickering* is to weigh Hughes' interests in speaking and gathering information against the Patrol's interest in pro-promoting efficiency, discipline and morale.[11] In weighing these interests, we are to consider both the nature of the employment relationship and the nature of the speech activity involved. *Pickering v. Board of Education*, 391 U.S. 563, 569-73, 88 S.Ct. 1731, 1735-1737, 20 L.Ed.2d 811. With this in mind, we are convinced that the evidence in this case tilts the balance so heavily in favor of the Patrol's interest that Hughes' first amendment claim borders on the frivolous.

B. *The Patrol's Substantial Interest in Maintaining Morale v. Hughes' Dissension Causing Speech-Related Activity*

More so than the typical government employer, the Patrol has a significant government interest in regulating the speech activities of its officers in order "to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law

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11. As the Court recently expressed in *Connick v. Myers*, ... U.S. ....., 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), "the courts must reach the most appropriate possible balance of the competing interests." *Id.* ..... U.S. at ....., 103 S.Ct. at 1691, 75 L.Ed.2d at 722. Furthermore, this inquiry is treated as a legal determination which appellate courts are qualified to make. *Id.* ..... U.S. at ....., 103 S.Ct. at 1690 n. 7 at 720, fn. 7 ("The inquiry into the protected status of speech is one of law not fact."). *See also Bickel v. Burkhart*, 632 F.2d 1251, 1256 (5th Cir.1980); *Tygrett v. Barry*, 627 F.2d 1279, 1287 (D.C.Cir.1980).

enforcement institution." *Gasparinetti v. Kerr*, 568 F.2d 311, 315-16 (3rd Cir.1977), *cert. denied*, 436 U.S. 903, 98 S.Ct. 2232, 56 L.Ed.2d 401 (1977); *also see* Note, *Free Speech and Impermissible Motive in Dismissal of Public Employees*, 89 Yale L.J. 376, 381, 381 n. 14 (1979). As the Supreme Court recognized in *Kelley v. Johnson*, 425 U.S. 238, 246-47, 96 S.Ct. 1440, 1445-1446, 47 L.Ed.2d 708 (1976), a police department has a substantial interest in developing "discipline, *esprit de corps*, and uniformity" within its ranks so as to insure the safety of persons and property. *See Waters v. Chaffin*, 684 F.2d 833, 839 (11th Cir. 1982); *Kannisto v. City and County of San Francisco*, 541 F.2d 841, 843 (9th Cir.1976), *cert. denied*, 430 U.S. 931, 97 S. Ct. 1552, 51 L.Ed.2d 775 (1978); *cf. Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17, 26 (2nd Cir.1979) (fire department, like police department, has greater than normal government interest in maintaining morale and discipline).

Pursuant to this substantial interest, the Patrol, as a paramilitary force, should be accorded much wider latitude than the normal government employer in dealing with dissension within its ranks. *Wilson v. Taylor*, 658 F.2d 1021, 1027 (5th Cir. 1981); *Gasparinetti*, 568 F.2d 311, 321-22 (3rd Cir.1977) (Rosenn, J., concurring in part and dissenting in part); *cf. Chappel v. Wallace*, ... U.S. ....., 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).[12] This requires

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12. In *Chappel v. Wallace*, the Supreme Court recently articulated the very limited role the judicial branch has in reviewing military decisions that have an effect on soldier's constitutional rights. In unanimously holding that military personnel may not maintain suits to recover damages for alleged constitutional rights, the court stated:

> . . . The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to

(Continued on following page)

judicial deference on two levels in this case. First, the Patrol's determination that an officer's speech-related conduct has contributed to dissension within the ranks is entitled to considerable deference. *Kannisto*, 541 F.2d at 844, *citing Kelley*, 425 U.S. at 246, 96 S.Ct. at 1445. Second, the Patrol's discretionary decision to reassign or discipline an officer whose speech-related conduct has contributed to dissension is similarly entitled to considerable deference. *Waters*, 684 F.2d at 839. As the Supreme Court has recently expressed in *Connick v. Meyers*, ... U.S. ....., ..., 103 S.Ct. 1684, 1692, 75 L.Ed.2d 708, 723 (1983), "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[13]

Despite the district court's failure to so find, the evidence in the record clearly shows that there was a substantial morale problem in Troop "G" due to a personality dispute between Lt. Elmore and Hughes. Superintendent Whitmer, the ultimate transferring authority, Major Hoffman, whom the Superintendent ultimately relied upon

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Footnote continued—

> personal liability at the hands of those they are charged to command. Here, . . . we must be "concern[ed] with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superior into court." *Id.* ..... U.S. at ....., ..., 103 S.Ct. at 2367. (Citations omitted.)

While the military is distinguishable from the Patrol, we believe the same factors necessitating judicial deference to military decision—the compelling need for decisive action, discipline and harmony in the ranks—counsel in favor of according deference to the Patrol's decision here.

13. The dissent urges that this court should not accord any deference to the Patrol's determination as to the source of and remedy to dissension within its ranks. However, the dissent offers no cases directly supporting this questionable proposition. The dissent does point to cases saying we should view the government employer's self serving, after the fact justifications with studied scepticism. However, here there was nothing "after the fact" or pretextual about the justification for the transfer.

in making the transfer decision, and Captain McKee all testified that an intense personality conflict existed between Elmore and Hughes. Major Hoffman, who conducted interviews with a number of Troop "G" patrolmen, including Elmore and Hughes, concluded that because of this conflict, Hughes and Elmore had lost their effectiveness and were disrupting the effectiveness of the entire troop. Major Hoffman determined that the major source of the friction between Hughes and Elmore was Hughes' various investigations and allegations regarding Elmore's son's drug-related activities. Hughes had also apparently become involved in a problem between the Elmore family and the parents of a 16-year-old girl who had been dating Elmore's son. Elmore reciprocated by conducting his own investigation of Hughes and by indicating his intention to file a defamation of character suit against Hughes. During their interviews with Hoffman, both Hughes and Elmore expressed their personal dislike for each other.[14]

While this battle between Hughes and Elmore was raging, several patrol officers speculated that either Hughes or Elmore would be transferred, depending on the relative weight the Superintendent would accord to Elmore's and Hughes' political connections. Several officers expressed the view that Major Hoffman could not "win" no matter what suggestion he made to resolve the dispute. Hoffman also found that many of the officers

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14. The dissent's suggestion that the dissension in Troop G occurred only after Elmore's visit to Superintendent Whitmer in early October is a distortion of the record. According to the troopers interviewed by Hoffman, the dissension had existed for some time prior to the Hoffman report to Superintendent Whitmer in early October. It was only after receiving Hoffman's report in early October that Superintendent Whitmer first learned about the gravity of the problem. It is absurd to suggest that because Whitmer and Hoffman first learned about the serious nature of the problem in early October the dissension problem could not have arisen at some earlier time.

had taken sides in the dispute. Some officers expressed negative feelings about Elmore because of his son's possible involvement in drugs, and others disapproved of Elmore's retaliatory investigation of Hughes. On the other hand, some officers were critical of Hughes' obsession with Elmore's family affairs. Officers were also critical of various actions Hughes had taken in the past, wholly apart from his investigation of Elmore's son. Specifically, Hughes was criticized for: (1) filing baseless written reports criticizing Troop "G" radio operators for dereliction of duty;[15] (2) spending too much time patrolling the Mountain View area so that he could associate with his wealthy industrialist friend; and (3) reporting to a local school board that two teachers were engaged in a "compromising assignation."

Based on the foregoing evidence, we believe the Superintendent reasonably concluded that both Hughes and Elmore contributed to the morale problem in Troop "G", leading the Superintendent to exercise his statutory discretion and reassign both officers to other troops. Our review of this highly discretionary transfer decision is constitutionally limited to the extent that it was traceable, either directly or indirectly, to Hughes' speech-related activities. *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-85, 97 S.Ct. 568, 574-575, 50 L.Ed.2d 471 (1977); *See Bowen v. Watkins*, 669 F.2d 979, 985-86 (5th Cir.1982). In this case, although Hughes' transfer was directly traceable to dissension within Troop "G," it was at least indirectly traceable to Hughes' various speech-related accusations and investigations regarding Elmore's son, and to a lesser extent his reports criticizing fellow officers, his report to the school board regarding two

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15. As the dissent points out, Hughes testified that one of these reports was entirely justified. Other troopers apparently disagreed. The trial court did not make any finding on whether the reports were well-founded or baseless.

teachers, and his alleged on-the-job association with a wealthy industrialist. Even so, applying the factors enunciated in *Pickering*, 391 U.S. 570-73, 88 S.Ct. at 1735-1737, the Patrol has clearly demonstrated that these speech-related activities had the ultimate effect of (1) interfering with the Patrol's maintenance of harmony among its employees; (2) impeding Hughes' proper performance of his duties; and (3) interfering with the regular operation of the troop. We therefore conclude that the Patrol has clearly demonstrated its significant interest in dealing with the disruptive effects of Hughes' speech-related conduct.

Furthermore, the transfer decision here was an entirely appropriate and reasonable means of achieving the Patrol's significant interest in maintaining discipline and harmony. Admittedly, a transfer traceable to speech-related activity is properly the subject of first amendment challenge, even though the transfer resulted in no loss of pay, seniority, or other benefit. *Egger v. Phillips*, 669 F.2d 497, 501 (7th Cir.1982), *McGill v. Board of Education of Perkins Elementary School*, 602 F.2d 774, 780 (7th Cir. 1979). However, because the officers in Troop "G" had divided their loyalties between Hughes and Elmore, the Superintendent was required to devise a solution that would appear completely impartial and, at the same time, improve the morale and efficiency of the troop. With this in mind, the Superintendent viewed a transfer of both Elmore and Hughes as an effective, nondiscriminatory and nonpunitive[16] solution to the morale problem. To foreclose

16. Hughes was offered moving expenses and was provided the same job status and pay in Troop "C" as he had enjoyed in Troop "G." If the transfer had been punitive, Hughes could have been denied moving expenses. The view shared by a few rural troopers that Troop "C" was an undersiable assignment is not particularly probative as to whether the transfer was punitive. Major Hoffman, who recommended the transfer to Troop "C", testified that the decision was made based upon the personnel needs of other troop commanders.

that solution in this case would entail a serious encroachment on the Superintendent's discretionary decision to reassign personnel in the interest of promoting public safety. We therefore follow the dicta in *Waters*, 684 F.2d 839, that the "reasonable possibility of adverse harm will generally be enough to invoke the full force of judicial solicitude for a police department's internal morale and discipline." *See also Connick v. Myers*, ... U.S. at ....., 103 S.Ct. at 1692, 75 L.Ed.2d at 723.

We do not view Hughes' various dissension causing, speech-related activities as being of such public and social importance as to override the Patrol's substantial interest in maintaining troop morale. In *Connick v. Myers*, ... U.S. at ..... 103 S.Ct. at 1690, 75 L.Ed.2d at 720, the Supreme Court held that where an employee's speech does not involve a matter of public concern (considering the context, form and content of the speech), "a federal court is not the appropriate forum in which to review the personnel decision taken by a public agency allegedly in reaction to the employee's [speech activity]." However, even if the speech activity may be fairly characterized as involving a matter of public concern, the state's burden in justifying its personnel decision depends upon the nature of the employee's expression. *Id.* ..... U.S. at ....., 103 S.Ct. at 1691-1692, 75 L.Ed.2d at 722. Particularly relevant in this inquiry is the manner, time, and place in which the speech-related activity occurred. *Id.* ..... U.S. at ....., 103 S.Ct. at 1692, 75 L.Ed.2d at 723. As the court noted in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414 n. 4, 99 S.Ct. 693, 696 n. 4, 58 L.Ed.2d 619 (1979), "an employing agency's institutional efficiency may be threatened not only by the context of the employee's message but also by the manner, time, and place in which it is delivered." *Accord, Nathanson v. United States*, 702 F.2d 162, 165-66 (8th Cir.1983) (where

manner in which employee expressed his view hindered his ability to perform his job and threatened the overall operations of his employer, termination of employee did not violate his first amendment rights).

The most significant of Hughes' dissension causing, speech-related activity concerned his investigation and accusation regarding Elmore's son. While Hughes' investigation and accusation of illegal drug activities may be fairly characterized as involving a matter of public concern, it was the highly antagonistic manner in which he conducted his investigation and expressed his views regarding this investigation that forced the Superintendent to make the transfer decision. Troop "G" officers, referring to Hughes' accusations regarding Elmore and his son, concluded that Hughes had become too personally involved in Elmore's family affairs, hindering his own job performance and disrupting troop morale. However, far from taking sides with Elmore in this dispute, the Superintendent decided to transfer both officers to other troops for the good of troop morale. Thus, we are not dealing here with a heavy handed measure, clearly designed to punish or chill the content of expressions on matters of public concern. Rather, the Patrol's remedy here was narrowly tailored to deal with the disruptive effects of Hughes' antagonistic manner of exercising his first amendment rights.

Furthermore, as has been recognized by other courts, where an officer's speech-related activity has the effect of materially disrupting his working environment, such activity is not immunized by constitutional guarantees of freedom of speech. *Kannisto*, 641 F.2d at 844; *Santos v. Miami Region, United States Customs Service*, 642 F.2d 21, 25 (1st Cir.1981); *Sprague v. Fitzpatrick*, 546 F.2d 560, 564 (3d Cir.1976), *cert. denied*, 431 U.S. 937, 97 S.Ct. 2649, 53 L.Ed.2d 255. In *Connick v. Myers*, ... U.S. ....., 103

S.Ct. 1684, 75 L.Ed.2d 708, the Supreme Court indicated that a government employer can take action against an employee for potentially disruptive expression even though the government employer cannot "clearly demonstrate" that the expression "substantially interfered" with the institutional efficiency and morale. *Id.* ..... U.S. at ....., 103 S.Ct. at 1691, 75 L.Ed.2d at 722.[17] The court concluded that where an employee's speech merely touched, rather than "substantially involved" matters of public concern[18] and where "close working relationships were essential to fulfilling public responsibilities," an employer can take action against the employee for expression "which [the employer] *reasonably believed* would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* ..... U.S. at ....., ..., 103 S.Ct. at 1692-1693, 75 L.Ed.2d at 723, 724. (Emphasis added.) As the Court explained:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer

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17. In *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 513, 89 S.Ct. 733, 740, 21 L.Ed.2d 731 (1968) the Supreme Court first applied the material disruption standard in the context of the academic environment. The Court noted that where a student's expression "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school," such expression was not protected by the first amendment. In applying this standard, the Court emphasized the deeply rooted tradition of encouraging the free and robust exchange of ideas in the academic setting. *Id.* at 512, 89 S.Ct. at 739-740. In *Pickering*, the Supreme Court gave no indication whether a lesser showing of disruption or interference would be necessary to curtail the speech-related activities of public employees outside the context of the academic environment.

18. In *Connick*, the employee's expression entailed a questionnaire to other employees basically criticizing her supervisor's internal office policies, with only one question addressing whether the employees felt pressured to work in particular political campaigns.

> to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

Id. ..... U.S. at ....., 103 S.Ct. at 1692, 75 L.Ed.2d at 723.

Fortunately, whether this lesser showing of interference with governmental operations applies here is of academic interest because even assuming Hughes' speech "substantially involved" matters of public concern, the Patrol has met the stronger showing of "clearly demonstrating" that Hughes' expression "materially and substantially interfered" with the maintenance of discipline and harmony in Troop "G."

C. *Hughes' Purported Whistle-Blowing Activities*

We recognize that the first amendment balancing test cannot be controlled by a finding that disruption has occurred where such disruption occurs because a public employee blows the whistle on the corruption of public officials. *Porter v. Califano*, 592 F.2d 770, 773-74 (5th Cir. 1979); *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063 (8th Cir.1979); *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 25 (2nd Cir.1979). As the Fifth Circuit has aptly stated "it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because their speech somewhat disrupted the office." *Porter*, 592 F.2d 773-74. Thus, an employee's first amendment interest is entitled to more weight where he is acting as a whistle-blower exposing government corruption. *Brockell v. Norton*, 688 F.2d 588, 593 (8th Cir.1982); *Foster v. Ripley*, 645 F.2d 1142, 1149 (D.C.Cir.1981). However, we do not view this case as a "whistle-blower" type case because Hughes' transfer was wholly unrelated to his purported corruption exposing activities.

At trial, Hughes testified that he believed Captain McKee was involved in a ticket-fixing incident some five or six years ago, but that he had no personal knowledge regarding the incident. Captain McKee denied having ever fixed any traffic ticket. There was no other testimony regarding this alleged occurrence. Hughes also testified that Captain McKee and Lt. Hickman were involved in a cover-up of a prisoner abuse incident. Though having no personal knowledge of the incident, Hughes referred to a report written by Trooper Mitchell and Sergeant Zorsch indicating that an officer had allegedly handcuffed and struck an arrestee. Captain McKee allegedly concealed this report and, after interviewing the two officers purportedly involved in the beating, collaborated with Lt. Hickman in writing another report discrediting the arrestee's allegations. Sergeant Zorsch testified that while he believed some of the arrestee's allegations were true, Captain McKee could have reasonably reached a different conclusion and was not trying to cover up something. Lt. Mitchell was unavailable to testify regarding the incident and Captain McKee and Lt. Hickman firmly denied any cover-up of the incident.

Hughes claims that his transfer was made in retaliation for his investigations and allegations regarding the ticket-fixing incident and the cover-up of the police brutality incident. Were this true, a different case would be presented. *See Atcherson*, 605 F.2d 1058. However, the evidence clearly shows neither Superintendent Whitmer nor Major Hoffman ever knew about, let alone disapproved of or attempted to interfere with, Hughes' investigations and expressions regarding the alleged ticket-fixing or police brutality. Furthermore, there is no evidence that the dissension that existed within Troop "G" was even remotely related to Hughes' investigations and expressions regarding these alleged improprieties. Super-

intendent Whitmer testified that he was completely unaware of Hughes' allegations of improprieties until Hughes testified about them at trial. Major Hoffman testified that the alleged improprieties were never mentioned by any of the troopers he interviewed, not even by Hughes. Hughes testified that despite having the opportunity, he never told Hoffman or anybody else within the Patrol's command staff about his investigations concerning these alleged improprieties; nor did Hughes ever file any report regarding these incidents. Under the circumstances, we do not believe Hughes has shown or indeed can ever show that his reputed whistle-blowing investigations were what caused his transfer. *See Mount Healthy City School District v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977).

Finally, there is no support for Hughes' claim that he was transferred because the Patrol disapproved of or sought to interfere with his legitimate surveillance of the Mountain View Airport for possible drug importation. Quite to the contrary, Hughes admitted that Captain McKee actively encouraged Hughes' surveillance, even though a state representative had filed a complaint regarding the surveillance. Hughes also testified that Captain McKee placed a call to Jefferson City requesting surveillance equipment for Hughes. Later, when the surveillance equipment was not forthcoming, Hughes never asked Captain McKee to renew the request. We can find no indication that the Patrol ever interfered with Hughes' surveillance,[19] even though Hughes had spent an entire

19. In an internal memorandum, Lt. Hickman expressed his opinion that it was not necessary for Hughes to spend all of his time patrolling the Mountain View area. We do not interpret this suggestion as either disapproving of or interfering with Hughes' surveillance of the Mountain View Airport. Instead, Lt. Hickman's suggestion was made because an officer was already stationed in the Mountain View area.

year on this project without ever finding any tangible evidence of impropriety.

Furthermore, Superintendent Whitmer testified that the transfer decision had nothing to do with the state representative's criticism of the airport surveillance. This testimony was corroborated by Major Hoffman's internal report and recommendation regarding the morale problem in Troop "G."

D. *Hughes' "Political" Association with Claud Trieman*

Despite the dissent's suggestion, there is no support for Hughes' claim that his off-duty first amendment protected association with Claud Trieman was a "motivating factor" behind the transfer decision, let alone the "but for" cause of the transfer decision. *See Mount Healthy*, 429 U.S. at 287, 97 S.Ct. at 576. The record does show that other troopers complained that Hughes' on-the-job association with Trieman was interfering with the performance of his duties. Troopers also expressed the belief that Hughes was currying favors in order to elicit Trieman's support in his bid for the Superintendent's position. However, even the dissent is not so bold as to suggest Hughes' associational rights permit him to associate with whomever he likes and whenever he likes while he is on duty.[20] And, even assuming this criticism of Hughes'

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20. The dissent points to the Disciplinary Report of Captain McKee as evidence that officers were critical of Hughes "off-duty" association with Trieman. However, far from supporting the dissent's position, the Report actually reveals that McKee, like other troopers in "Troop G," believed that Hughes' own personal political ambitions were determining where he would decide to spend his time while on duty. And while the trial testimony does contain references to Hughes' political association with Trieman, nothing about those references can be interpreted as a criticism of Hughes' legitimate off-duty association with Trieman.

on-duty association with Trieman is interpreted as an implied criticism of Hughes' legitimate off-duty association with Trieman, we believe the record clearly shows that the transfer decision would have been made regardless of such association. The primary source of the dissension in Troop "G" concerned Hughes' and Elmore's battle over Elmore's son's possible involvement in drug-related activity. Hughes' association with Trieman was peripheral to this dissension and, hence, was not at the center of the Superintendent's effort to remedy the dissension by transferring both Hughes and Elmore out of Troop "G."

E. *Conclusion*

We therefore conclude that it is unnecessary and would be a waste of judicial resources to remand this case to the district court for a determination of whether the transfer was designed to discipline Hughes for his legitimate investigation of improprieties in Troop "G," his surveillance of the Mountain View Airport, or his association with Claud Trieman.

The dissent, choosing to rely entirely on Hughes' uncorroborated claims that he was disciplined for his legitimate whistle-blowing activities, concludes that we should not accord any deference to the Patrol's determination to transfer Hughes because of his dissension causing activities. The dissent cites no case support for this novel proposition.[21] Indeed, as we have mentioned above, the case authority clearly indicates that we should accord considerable deference to the Patrol's determination that an employee's activities have disrupted efficiency and morale. *See Connick v. Myers*, ... U.S. at ....., 103 S.Ct. at 1692, 75 L.Ed.2d at 723; *Kannisto*, 541 F.2d at 844, *citing Kelley*, 425 U.S. at 246, 96 S.Ct. at 1445; *Waters*, 684 F.2d at 839.

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21. *See supra, note* 13.

In any event, despite the dissent's suggestion, the district court did not find and the record clearly does not suggest that Hughes was transferred to punish him for his legitimate whistle-blowing investigations and his legitimate off-duty political associations.

The dissent also suggests that the district court's findings are contrary to our conclusion that the transfer was designed to resolve dissension within Troop "G." The district court made no finding concerning whether the transfer decision was designed to resolve a dissension problem within Troop "G"; nor did the district court discredit Superintendent Whitmer's and Major Hoffman's testimony regarding the gravity or source of the dissension problem within Troop "G." The dissent however points out that the district court found that Hughes' transfer was disciplinary in nature. This district court finding was the basis for its conclusion that Hughes was entitled to a "name-clearing" hearing. Certainly a finding that the transfer was sufficiently disciplinary in nature so as to trigger "name-clearing" hearing is not inconsistent with our conclusion that the transfer was also designed to remedy a dissension problem. Indeed, as we have indicated above, the transfer here may be characterized as disciplinary in the sense that it was indirectly traceable to Hughes' dissension causing activities (as distinguished from his legitimate whistle-blowing activities). However, having carefully weighed the substantial interests of the Patrol and Hughes' speech interest, we have concluded that the transfer decision here was an entirely reasonable measure and not violative of Hughes' first amendment rights.

In striking the *Pickering* balance in this case, we are compelled to emphasize that free speech claims are not to be considered in a vacuum but must be viewed in light

of the circumstances and in the context of all relevant conditions existing at the time of the asserted free speech activities. Nor should free speech rights be utilized to provide immunity to other actions that merit condemnation, discipline or sanctions assessed in the public interest. *See Mt. Healthy,* 429 U.S. at 285-86, 97 S.Ct. at 575-576. The public weal demands that public officials carry out their duties and responsibilities so that their offices are run efficiently, harmoniously and responsive to the administration of the public service they are employed to perform. In particular, paramilitary units have a need to uphold morale, an *esprit de corps* and an affirmative public image.

Judgment reversed.

McMILLIAN, Circuit Judge, dissenting.

I agree fully with the majority opinion's due process analysis. Accordingly, I concur in Part II of the majority opinion. But, because I substantially disagree with the majority's reading of the record and application of the law on the first amendment issue, I must respectfully dissent. The facts presented in the majority opinion represent only one side of the story. The following Hughes' version of the key incidents leading up to his transfer.

I. THE "FACTS"

In the months preceding his transfer, Hughes was involved in several investigations and activities that raised the ire of his supervisors, particularly Lt. Elmore. One investigation concerned Lt. Elmore's son's alleged drug dealing. During this investigation, Hughes and his partner, Trooper Tuschhoff, suspected that Lt. Elmore was leaking information to his son and his son's cohorts. To verify their suspicions, Tuschhoff gave Lt. Elmore fictitious information about a planned raid on the residence of a

group of suspected drug dealers with whom Elmore's son was associated. The next day these suspects moved out of Willow Springs.

Another investigation involved the Mountain View Airport. Hughes had received information that suspicious late-night flights in and out of the airport might be related to drug smuggling. In response to this information, Hughes asked Capt. McKee to obtain special night surveillance equipment. Capt. McKee, with Hughes present, placed a call to Capt. Maddox who was in charge of the equipment. Capt. Maddox informed Capt. McKee that he had surveillance equipment that would be available. Capt. McKee then told Hughes that he would get the equipment and that Hughes should continue the investigation. But Capt. McKee also cautioned Hughes that he should be very careful in conducting his investigation because several prominent citizens housed their aircraft at Mountain View. The surveillance equipment never came, however, despite the fact that Hughes renewed his request on at least two occasions. Tr. at 84. In any event it did not matter, because soon after Hughes disclosed this information to his superiors, the suspicious flights suddenly stopped. It was also revealed that a state legislator who kept his plane at Mountain View had visited Supt. Whitmer and complained at length about Hughes' investigation of the Mountain View Airport. Although Supt. Whitmer told the state legislator that he did not want the state legislator to tell him how to run the Patrol, Supt. Whitmer did assure the state legislator that he "would make an inquiry into the matter" and would "resolve the problem." Tr. at 31.

Hughes also was involved in an incident which he alleges led to a cover-up of a Troop "G" dispatcher's dereliction of duty. The majority refers to this as a "baseless" accusation. *Supra* at A6, A24. One evening Hughes was

working the desk at headquarters because of a shortage of desk personnel. The only other person in the office was the radio dispatcher. Hughes received a call reporting a serious auto accident in the area. Hughes, being the closest trooper, responded to the call and left the dispatcher to cover the desk. At the scene, Hughes discovered that there had been a head-on collision between two cars at the crest of a hill. The area was very dark. One car was blocking the road, while the other car was in a ditch with a person pinned inside of it. Gasoline was pouring from one car's ruptured gasoline tank toward one of the injured occupants of the cars. Another victim was soaked in blood and walking the roadway in a daze. In short, Hughes had a highly dangerous situation to cope with all by himself. He radioed the dispatcher for a fire truck, an ambulance, and a wrecker. The radio dispatcher replied angrily that he was busy on the phone. The dispatcher gave no further answer to Hughes' request and not dispatch any assistant to Hughes. Hughes explained that the reason the dispatcher was angry was because the dispatcher did not like to be left alone to answer both the phones and the radio. Eventually assistance did arrive when the City Police of Willow Springs dispatched the requested equipment after they overheard Hughes' pleadings for help on the radio. Hughes reported this incident to his Zone Sergeant. Hughes' Zone Sergeant told him not to tell the Captain, but Hughes did anyway. The Captain told Hughes to write a report which Hughes did. The Captain then took Hughes' report to the dispatcher and told the dispatcher to rewrite the report. The dispatcher rewrote the report exonerating himself and blaming Hughes for the incident. This revision became the official report. The Captain then told Hughes that he was not to report this incident to Patrol General Headquarters in Jefferson City because the Captain did not want his superiors in

Jefferson City to think he could not run his Troop. Hughes also testified that Lt. Hickman told him to "play it cool. We've just got a couple more years and we'll all retire and get out of your hair." Tr. at 91-94.

Yet another investigation concerned an alleged cover-up of "police brutality" occurring at Troop "G" headquarters. According to Hughes, two troopers carried out a personal vendetta against a person by arresting him and beating him while he was handcuffed and in the troopers' custody. An internal report of the incident was prepared by Sgt. Zorsch. Sgt. Zorsch's report revealed that the allegation was in part true and that one of the accused troopers even admitted to beating the arrestee. Tr. at 150. Capt. McKee, however, rejected Sgt. Zorsch's report and ordered him to submit an abbreviated version which would state that the arrestee received his injuries when he accidentally fell down. Sgt. Zorsch was also ordered to destroy the original report and to submit the abbreviated version to headquarters as the official report. Sgt. Zorsch followed Capt. McKee's orders even though he was of the opinion that the original report was a full, fair, and accurate recount of the incident. Tr. at 149. Hughes retrieved the report from the office waste paper because he believed Capt. McKee and Lt. Hickman were attempting to cover up the incident due to a threatened civil rights lawsuit. Hughes felt that such a cover-up violated the law and was an extreme breach of a law enforcement officer's duty. Because Hughes did not trust his immediate superiors and because Supt. Whitmer was unavailable to Hughes, Hughes took this and other information to a friend named Claud Trieman who was a member of the Governor's Crime Commission. As the majority notes, Hughes did so in the hope that Trieman, as a member of the Crime Commission, could intercede with the higher

echelon at Patrol General Headquarters to initiate some reform within Troop "G." Tr. at 89-90.

Hughes had also become involved in politics and had developed a close political association with a "local industrialist" named Claud Trieman—the same Claud Trieman who was a member of the Governor's Crime Commission. With the help of Trieman and other local politicians, Hughes sought to become the Superintendent of the Patrol. Hughes eventually lost the nomination to Supt. Whitmer. But Hughes' initial foray into politics incensed his superiors. According to Hughes, Lt. Hickman, Lt. Elmore and Capt. McKee resented Hughes because his political activity was "not a normal thing for one in [Hughes'] position as a lowly trooper." Tr. at 68. Hughes also testified that Capt. McKee told him he better not associate with Trieman because Trieman had begun to get involved in politics. Additionally, the disciplinary reports prepared by Capt. McKee and Lt. Hickman list Hughes' off-duty political association with Trieman as one of the reasons why Hughes should be disciplined. *See* Capt. McKee's endorsement of the report on "Disciplinary Action—Trooper W. E. Hughes," Exhibit 17, at 3, ¶ 2 (hereinafter referred to as Disciplinary Report).

The chronology of the events in this case is also important. The senior staff at Patrol Headquarters in Jefferson City first received information about trouble in Troop "G" in August of 1981. At that time Capt. McKee told Maj. Hoffman about a "problem" within the Troop. The "problem" was that Lt. Elmore's son had been implicated in selling illegal drugs. Tr. at 202-03. On September 30, Maj. Hoffman received information that the state legislator who housed his airplane at Mountain View Airport had complained to the Captain of Troop "I" about Hughes' Mountain View investigation. At about this same time,

the state legislator also complained bitterly to Supt. Whitmer about Hughes' investigation. Tr. at 30. It was at this meeting with the state legislator that Supt. Whitmer promised that he would "resolve the problem." Shortly thereafter, Lt. Elmore met with Supt. Whitmer to complain about Hughes' investigation and Hughes' political association with Trieman. Tr. at 28-29. During Lt. Elmore's meeting with Supt. Whitmer, Supt. Whitmer asked Elmore for his advice on how the Superintendent should proceed on this matter. Elmore suggested that Hughes be transferred to Troop "C." Troop "C" is considered by many rural troopers to be the "Siberia" of the Patrol. Tr. at 129, 139, 156, 172. In fact, at least one trooper from Troop "G" was transferred to Troop "C" as punishment for being intoxicated while on duty. Tr. at 54. After Lt. Elmore made this suggestion, the meeting ended and Supt. Whitmer told Lt. Elmore that Maj. Hoffman would "resolve" the problem. Tr. at 29. Supt. Whitmer, however, denied that he made a decision to transfer Hughes at that time. Tr. 28-30. Yet there was testimony that according to Lt. Elmore, Supt. Whitmer asked Lt. Elmore to which troop would Hughes least like to be assigned. Lt. Elmore's reply was Troop "C" and, reportedly, Whitmer's response was "that's where I'll send him." Tr. at 139.

Up until this point, around the first of October, there was *no dissension* within Troop "G." Tr. at 143-44, 145-46, 158. When Lt. Elmore returned to Troop "G" from Jefferson City, around October 3 or 4, he told several troopers that he was having Hughes transferred to Troop "C." It was only at this juncture that dissension began to brew in Troop "G" as troopers took sides over the rumored transfer of Hughes. Tr. at 143-44, 206. On October 7, Capt. McKee called Maj. Hoffman and told him of the growing dissension. At McKee's request, Maj. Hoffman came down to Troop "G" the next day in order to discuss

the Troop's problems with some of its members during a regularly scheduled meeting. Maj. Hoffman interviewed several members and concluded that the troop was indeed split into two camps. Then, on October 10, Capt. McKee received a telephone call from Maj. Hoffman asking if Capt. McKee would accept a Troop "C" trooper's transfer to Troop "G" in exchange for Hughes. Tr. at 295. Capt. McKee said he would agree. Yet, according to the testimony of Maj. Hoffman, the decision to transfer Hughes was not made until October 15 or 16.

After Lt. Elmore returned from Jefferson City he began to seek information from Troop members that would discredit Hughes. Tr. at 164-65. Elmore even hired someone to investigate Hughes. Meanwhile, Lt. Elmore prepared a report dated October 12 in which he recommended that Hughes be transferred because of his investigation of Elmore's son, because of Hughes' other "seemingly uncontrollable actions over the last few years" that discredited the Patrol, and because of "Hughes' close association with a local wealthy industrialist who is heavily involved in statewide politics." Disciplinary Report at 1. Lt. Hickman's endorsement, dated the same day, also recommended Hughes' transfer and reiterated the reasons given by Lt. Elmore. In turn, Capt. McKee endorsed the report on October 13 and concluded that because Hughes had "caused a great deal of turmoil in the Troop . . . with his controversial actions and political manuevering," he should be transferred "for the benefit of all concerned." *Id.* at 5, ¶ 10. The day after endorsing Lt. Elmore's report, Capt. McKee recommended that Lt. Elmore also be transferred. Supt. Whitmer placed the third and final endorsement on Lt. Elmore's report. Supt. Whitmer then ordered Hughes to be transferred to Troop "C," effective October 19, and Elmore to be transferred to Troop "D," another rural troop,

effective November 1. Whitmer's endorsement, however, was dated October 27, 1981, eleven days *after* Hughes was told to report to Troop "C."

Maj. Hoffman met with Hughes on Friday, October 16, 1981, the day the decision to transfer Hughes was supposedly made. Hoffman ordered Hughes to report to Troop "C," some 200 miles away, that Monday, October 19 for permanent assignment. Hughes had heard rumors of his impending transfer, and at this meeting he asked Maj. Hoffman, "How come a State Representative knows over a week ahead of time that I'm being moved." Hughes testified that Maj. Hoffman replied, "Well, I didn't tell. It wasn't me that told." Tr. at 52.

II. THE RECORD EVIDENCE

From these highly disputed facts, the majority opinion makes two important factual findings: (1) the present record "clearly shows that the transfer was designed to resolve a substantial and debilitating morale problem in Troop 'G' ", and (2) Hughes' transfer was "wholly unrelated to his purported corruption exposing activities." *See supra* at A18-A19, A29. Based on these findings, the majority opinion concludes that the balance between the government's interest in efficiency and Hughes' first amendment interests "tilts . . . so heavily in favor of the Patrol's interest that Hughes' first amendment claim borders on the frivolous." *Supra* at A20. On the present record, I cannot agree.

It must first be emphasized that the district court below did not address Hughes' first amendment cause of action. Therefore, we have no pertinent findings of fact with which to review the first amendment issues raised by Hughes' complaint. The majority points out that the determination of whether conduct is protected by the first

amendment is a question of law which appellate courts are qualified to answer without regard to a district court's findings of fact. *See supra* at A20 n. 11. While it may be true that balancing the government's interests against an employee's interests is a legal determination, it is a determination which must be rooted in historical fact. *See Waters v. Chaffin*, 684 F.2d 833, 837 n. 10 (11th Cir.1982); *Bickel v. Burkhart*, 632 F.2d 1251, 1255 n. 7 (5th Cir.1980). The present record contains many disputed facts which can only be resolved on the basis of credibility. Thus, the procedural posture of this case is in many ways similar to that of cases which reach this court after the defendant has obtained summary judgment. In summary judgment cases, the appellate court will view the facts in the light most favorable to the non-moving party and will "give that party the benefit of all reasonable inferences to be drawn from the underlying facts." *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 857 (8th Cir.1978). Thus, in reviewing Hughes' first amendment claim, we should favor Hughes' version of the facts over the Patrol's version. If this is done, Hughes' first amendment claim is far from frivolous.

A. *The Motivating Factor*

The majority opinion's first factual conclusion is that the only motivating factor in the Patrol's decision to transfer Hughes was the desire to resolve a debilitating morale problem in Troop "G." I cannot agree with this factual conclusion because it is contrary to the district court's findings of fact relating to the due process issue. Throughout the trial below, the Patrol took the position that Hughes was transferred merely to remedy a personality conflict between Hughes and Lt. Elmore, and not as punishment for Hughes' investigatory and political activities. The Patrol's witnesses also testified that Hughes was transferred

to Troop "C" in particular simply to correct a troop imbalance within Troop "C." The whole thrust of the testimony presented by the Patrol was that Hughes' transfer was not a disciplinary measure. The majority opinion has adopted the Patrol's version of the facts without exception. But the district court, after listening to both sides' witnesses and studying their demeanor,[1] without exception *rejected* the Patrol's factual assertions. After a hearing on Hughes' motion for a preliminary injunction, the district court specifically found that Hughes' transfer was punitive and disciplinary.[2] This finding was echoed in the district court's decision on the merits. There, the district court held that Hughes "was not sent to Troop 'C' to remedy an imbalance in Troop "C" and that it felt "compelled by the weight of the evidence to conclude that the defendant ordered the transfer of the plaintiff for disciplinary reasons." *Hughes v. Whitmer*, 537 F.Supp. 93, 94, 97 (W.D.Mo.1982). These factual findings show that the district court believed Hughes and his witnesses and disbelieved the Patrol's witnesses. These findings therefore represent an implicit credibility finding against the Patrol's witnesses, including the defendant, and in favor of Huges' witnesses. This credibility determination,

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1. It should be noted that at least two troopers testified they feared that there would be reprisals against them if they testified adversely to their superiors. *See, e.g.*, Tr. at 156-57, 160, 171, 173-74, 131. Whether this fear was more imagined than real is irrelevant. The fact remains that the troopers felt this fear when they testified. Only the district court, who saw and heard the witnesses, can determine whether this fear affected the witnesses' testimony. This factor, which cannot be appreciated by reading a cold record, is an important element in determining the credibility of the testimony and, concomitantly, in deciding disputed questions of fact. This factor amplifies the need to remand this case so that the trier of fact can resolve the factual disputes.

2. This finding of fact was related to Hughes' due process count. The district court did not reach the merits of Hughes' first amendment claim in granting the preliminary injunction against the Patrol.

made by the trier of fact who actually heard and saw the live testimony, should again cause this Court to read the record evidence in the light most favorable to Hughes' position. Instead, the majority opinion rejects the testimony of Hughes and his witnesses without comment in favor of a ratification of the Patrol's witnesses' testimony. Normally, we would at least scrutinize the district court's findings of fact under the clearly erroneous standard of review. *See infra* at A54 n. 6.

The record evidence demonstrates that the district court's findings are not clearly erroneous. Indeed, there is substantial evidence to support the conclusion that Hughes was transferred to punish him. But punish him for what? Hughes' answer is that he was being punished for investigating possible wrongdoing by his superiors, for reporting his findings to a member of the Governor's Crime Commission, and for his political associations. Informative in this regard is Lt. Hickman's response to the district court's direct question, "Why did you recommend the transfer of Hughes and not recommend the transfer of Elmore?" Lt. Hickman's answer to this question was: "When is it going to stop where a trooper can take on a lieutenant? And when is a trooper going to be permitted to investigate a lieutenant and his son?" Tr. at 368. Equally illuminating is the Patrol's counsel's closing colloquy with the district judge. Counsel, in arguing that the Patrol did not want Hughes back in Troop "G," said "What will happen, the Patrol feels, is if Trooper Hughes is returned, his faction will begin to continue the events and items that they were involved in." Tr. at 391. According to Hughes' Disciplinary Report, those "events and items" included Hughes' legitimate investigation of possible illegal drug dealing by Elmore's son, Hughes' Mountain View Airport investigation which so upset a state legis-

lator, and Hughes' political association with "a wealthy industrialist." The Disciplinary Report itself lists these items as the principal reasons why Hughes should be transferred and, implicitly, why Elmore should not be transferred. Also, the record contains testimony presented to prove that Supt. Whitmer decided to transfer Hughes, and Hughes alone, in response to the state legislator's and Lt. Elmore's complaints about Hughes' investigations and political associations. Although far from convincing proof, this testimony does support the reasonable inference that these complaints were a substantial motivating factor in Supt. Whitmer's decision. Two other incidents which occurred after Hughes' transfer drive the point home. In one incident a trooper was "reminded" by Capt. McKee that the Patrol had a shortage of personnel across the state and if the trooper did not "cooperate" with the Captain, then the Captain "would not be expected to cooperate" with the trooper "in reference to these personnel changes." Tr. at 157. In another separate incident, the state legislator that was mentioned earlier told a trooper, "I've got one trooper moved and I'll get you moved if you fool with me." Tr. at 320-21. There was substantial testimony from Troop "G" troopers that they now fear to speak out against their commanding officers and are also afraid to investigate or arrest certain people. *See, e.g.*, Tr. at 156-57, 160, 171, 173-74, 177.

The second reason why I cannot agree that dissension was the motivating factor for Hughes' transfer is that the record raises a substantial question as to which came first. Did the dissension cause the Patrol to transfer Hughes or, rather, did the Patrol's decision to transfer Hughes cause the dissension? The present record does not make the former more plausible than the latter, and, if one views the facts in the light most favorable to Hughes,

the latter reflects the more probable sequence of events. Because first amendment rights are held in such high esteem, courts must conduct an "individualized and searching" review of the facts to determine exactly why the government took the action that it did. For the same reason, courts must view the government's self-serving after-the-fact justifications with studied skepticism. *See Peacock v. Duval*, 694 F.2d 644, 648 (9th Cir.1982); *Tygrett v. Barry*, 627 F.2d 1279, 1283 (D.C.Cir.1980). *See also* Finck, *Nonpartisan Speech in the Police Department: The Aftermath of Pickering*, 7 Hastings Const. L.Q. 1001, 1017 (1980).[3] This is especially true in cases, such as this one, in which the trier of fact has made a general credibility finding against the government's witnesses.

At least two troopers testified that there was no dissension and no debilitating morale problem in Troop "G" until *after* Lt. Elmore began to spread the word that Hughes was to be transferred in retaliation for his investigations and political associations. *See, e.g.*, Tr. at 143-44, 206, 336. Elmore made these statements around October 3. Maj. Hoffman did not conduct his investigation until October 8. Of course Maj. Hoffman observed dissension, but the dissension he saw was in all likelihood generated by Lt. Elmore's disclosure that the Patrol had decided to transfer Hughes. In fact morale in Troop "G" has continued to decline, rather than improve, after Hughes'

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3. The majority comments that the dissenting opinion offers no case support for the "questionable proposition" that a court should not defer to the judgment of a litigant when confronted with first amendment issues. *See supra* Majority Opinion at n. 13. I offer the above authorities, and those cited *infra* at note 6, for support. *See also Connick v. Myers*, ... U.S. ....., 103 S.Ct. 1684, 1692 n. 10, 75 L.Ed.2d 708 (1983) (collecting cases which hold that even after the trier-of-fact determines the historical facts, the appellate court must exercise its own independent judgment about the constitutional significance of those facts when first amendment rights are at stake).

and Elmore's transfers. Several troopers view Hughes' transfer as a signal that diversity of opinion will not be tolerated. At least two troopers actually testified that they fear reprisals from their superiors if they speak out or testify against their superiors or if they arrest the wrong people. As mentioned above, there is some testimony that supports the inference that Supt. Whitmer decided to transfer Hughes in the first few days of October in response to complaints from the state legislator and Lt. Elmore concerning Hughes' activities. *This was before the dissension erupted in Troop "G."* The state legislator had even bragged that it was he who had Hughes transferred and he tried to use this fact to procure deference from another trooper.

It must be noted also that the paperwork that rationalized the decision to transfer Hughes substantially lagged behind the actual decision to transfer Hughes. For example, Supt. Whitmer did not endorse the transfer recommendations until October 27, eleven days after Hughes was transferred. Hughes' § 1983 suit was filed two weeks after the transfer, but Maj. Hoffman knew that Hughes was represented by counsel as of the day Hughes was told to report to Troop "C." According to Hughes, the official rationalization for his transfer, like Sgt. Zorsch's report on the injured arrestee, may have been shaped by the threat of litigation. Although probative, I agree with the majority that this evidence is far from conclusive proof. The majority correctly notes that it would be absurd to say that dissension *could* not have arisen before the decision to transfer Hughes was made. Hughes, however, offered the testimony of his fellow troopers that indeed no dissension did exist up until Lt. Elmore returned from Jefferson City with the news that Hughes was to be transferred. The evidence is simply conflicting.

In such circumstances it is for the district court to decide whom to believe. Until a trier of fact decides between one side or the other, I cannot so easily dismiss the testimony favoring Hughes' position, especially when the district court specifically disbelieved Supt. Whitmer's explanation that Hughes' transfer was not a disciplinary measure.

B. *Unrelated to First Amendment Activities*

The majority's second factual conclusion was that Hughes' first amendment "whistle-blowing" activities were wholly unrelated to the decision to transfer him. The majority makes the point that Supt. Whitmer and Maj. Hoffman did not even know about Hughes' allegations that his superiors were covering up police brutality or ticket-fixing. But Lt. Elmore knew about Hughes' involvement in these incidents and he spoke to Supt. Whitmer about Hughes' "controversial activities." It was at that meeting that Supt. Whitmer told Elmore that the Hughes "problem" would be resolved. Besides, Supt. Whitmer testified that he had delegated much of the responsibility for the development of this decision to the command staffs of Troop "G" and Patrol Headquarters. Tr. 272. What is certain, however, is that Supt. Whitmer did know about Hughes' political activities as well as Hughes' Mountain View Airport investigation and the state legislator's reaction to it.

The majority also states that the dissension was wholly unrelated to these activities. Therefore, the majority concludes that because the transfer decision was based solely on the dissension in Troop "G," Hughes' purported whistle-activities could not have entered into the transfer decision. I would agree that the dissension was not caused by

Hughes' first amendment activities. Rather, the dissension was caused by the decision to transfer Hughes, and the decision to transfer Hughes was based on Hughes' first amendment activities. This is an important distinction and it is the basis for my difference of opinion with the majority. The majority also asserts that Hughes was not fired for whistle-blowing because he never told anyone about his investigations. Hughes' evidence is to the contrary. According to Hughes, he told Capt. McKee, Lt. Hickman, and a member of the Crime Commission about his investigations. The majority also claims that Hughes' transfer was unrelated to his Mountain View Airport investigation because Hughes' superiors never interfered with the investigation and even encouraged it. Besides, Hughes' investigation did not uncover any illegal activity. This reasoning misses Hughes' point that he was punished for *initiating* a legitimate investigation which angered a local politician, and not necessarily for what that investigation might have revealed. The majority, however, has chosen to accept Supt. Whitmer's testimony that the state legislator's complaints had nothing to do with Hughes' transfer. Again, it is my opinion that this choice should be made by the trier of fact.

Finally, the majority substantially underestimates the impact of Hughes' first amendment political activities on the Patrol's decision. This type of activity merits considerable first amendment protection. *See Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir.1981). The majority opinion does mention that the Patrol had a legitimate grievance against Hughes for his *"on the job"* association with Trieman and for spending too much time patrolling the area in which Trieman lived when that area was already patrolled by another trooper. Hughes' Disciplinary Report, however, is the best statement of the reason why the

Patrol did not like Hughes' *off-duty* political association with Trieman:

> Trooper Hughes has made a practice of patrolling east of Willow Springs in the Mountain View and Summersville area *when no other person was working that area* from Zone 1. *We approved of this practice* due to the fact that *the area needed attention*, and our member was able to make a great number of arrests and warnings in this area. After a period of time, our member became closely associated with a wealthy industrialist in the Mountain View area. We welcomed the fact that our member was being helpful to a man who was giving great financial assistance by providing industry and jobs to the residents of the Mountain View area; however, it soon became apparent that Hughes was friendly with the businessman due to the fact that he was attempting to become Superintendent of the Missouri Highway Patrol and was hopeful that his friend could assist him. Hughes did not succeed in becoming Superintendent; however, he has left the impression with some members of Troop G that he has strong ties with people in high places.

Disciplinary Report at 3, ¶ 2 (emphasis added). Additionally, the Patrol was willing to stipulate at trial that there was nothing improper about Hughes' on the job association with Trieman. Tr. at 116-17. Both the testimony at trial and Hughes' Disciplinary Report are replete with references to Hughes' off-duty political activities and associations. This is a strong indication that Hughes' legitimate off-duty political activities and associations were a substantial motivating factor in the decision to transfer Hughes.

III. THE LAW

In reviewing a public employee's claim that he has been punished for engaging in first amendment activities, the court must address three major issues:

(1) Has the plaintiff met the initial burden of proving that he was engaged in activity protected by the first amendment? *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968) (*Pickering*).

(2) If so, has the plaintiff met the burden of proving that his constitutionally protected activities were a substantial or motivating factor in the government's decision to take action against the plaintiff? *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977) (*Mt. Healthy*).

(3) If so, has the defendant met the shifted burden of proving that the same actions would have been taken against the plaintiff had the plaintiff not engaged in the protected activities? If so, the plaintiff's claim of first amendment retaliation will be defeated. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416-17, 99 S.Ct. 693, 697, 158 L.Ed.2d 619 (1979) (*Givhan*).

A. *The Pickering Balance*

In order to answer the threshold inquiry of whether the employee's activities are protected by the first amendment, the court must balance the government's interest in promoting efficiency and discipline against the employee's interest in speaking, gathering information, and engaging in political associations with others. The majority has concluded that the evidence in this case so heavily favors the Patrol's interests that Hughes' first amendment claim borders on the frivolous. I must disagree.

1. *The Government's Interest*

In my opinion, the majority decision is premised upon an overly deferential concern for the Patrol's interests in efficiency and discipline. For example, the majority opinion states that the government's interest in promoting efficiency is paramount to a public employee's first amendment interests. Such a notion is abhorrent to our nation's democratic ideals. It is also contrary to a long line of cases which hold that administrative efficiency is but one factor to be weighed in the *Pickering* balance and is by no means determinative. *See, e.g., Peacock v. Duval,* 694 F.2d 644, 647-48 (9th Cir.1982); *Porter v. Califano,* 592 F.2d 770, 773-74 (5th Cir.1979); *Bernasconi v. Tempe Elementary School District,* 548 F.2d 857, 862 (9th Cir. 1977), *cert. denied,* 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 82 (1977).[4] Additionally, in order for the government's interest in efficiency to carry any weight whatsoever in the *Pickering* balance, the inefficiency must have been caused by the employee's actions, not by the employer's *reaction* to the employee's first amendment activities. *See Monsanto v. Quinn.* 674 F.2d 990, 998-99 (3d Cir.1982). It would be anserine to permit the government to discipline its employees because of disruption caused by the government's repressive reaction to the employee's first amendment activities. I readily agree with the majority that Hughes' first amendment activities did not directly cause the dissension in this case. And therein lies the rub; without a causal relationship between the dissension and the reason for Hughes' transfer (his first amendment activities), the government's interest in efficiency carries no weight in the *Pickering* balance. *Id.*[5]

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4. *See supra* Dissenting Opinion note 3.

5. *See supra* Dissenting Opinion note 3.

Nor can I agree with the majority's conclusion that the Patrol, as a "para-military" organization, must be accorded considerable deference both in its decision that an employee's first amendment activities have caused dissension and in exercising its discretion to discipline such an employee.[6] The fact that Hughes works for a law enforcement agency is relevant only to the strength of the government's interest *vis a vis* Hughes' first amendment interests. It is just one factor to be weighed in the *Pickering* balance, and it has no independent significance that would compel the judiciary to defer *a fortiori* to a law enforcement agency's decision that impinges upon first amendment rights. *Tygrett v. Barry*, 627 F.2d 1279, 1283 & n. 3 (D.C.Cir.1980). The federal judiciary has a non-delegable duty to conduct an independent and

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6. The majority seems to imply that we should apply the clearly erroneous standard of review to the *Patrol's* "findings of fact." I cannot agree. If anything, we should view the Patrol's self-serving after-the-fact exculpatory statements with skepticism. The proper course this court should take is to apply the clearly erroneous standard of review to the trier-of-fact's findings. Because there are none in this case, I would remand the case to the district court. Also many cases have held that in the area of first amendment rights the court must view the government's self-serving after-the-fact justifications of its actions with studied skepticism. In doing so, the courts must exercise their independent judgment on the constitutional significance of the historical facts of the case. And in no event is the government's claim of dissension to be determinative in the *Pickering* balance. *See, e.g., Peacock v. Duval*, 694 F.2d 644, 648 (9th Cir.1982); *Monsanto v. Quinn*, 674 F.2d 990, 998-99 (3d Cir.1982); *Tygrett v. Barry*, 627 F.2d 1279, 1283 (D.C.Cir.1980); *Porter v. Califano*, 592 F.2d 770, 773-74 (5th Cir.1979); *Bernasconi v. Tempe Elementary School District*, 548 F.2d 857, 862 (9th Cir.1977), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 82 (1977). I agree with the majority that dissension certainly did exist in Troop "G." I disagree, however, that we must defer to the Patrol's judgment that Hughes' transfer was appropriate in a constitutional sense, i.e., that Hughes' first amendment activities caused the dissension and that the disabling effect of the dissension within Troop "G" outweighs Hughes' first amendment rights. *See also Connick v. Myers*, ... U.S. ....., 103 S.Ct. 1684, 1692 n. 10, 75 L.Ed.2d 708, and the discussion of the *Connick* holding *infra* at A55-A56.

"searching review of the factors asserted by the employer to justify the [discipline]. The purpose of such a review is to assure that those factors have been applied with the deference to be accorded first amendment rights." *Id.* at 1283.[7] The majority, however, takes the position that the Patrol has a substantial degree of discretion in conducting its personnel affairs and that, "under our constitutional tripartite division of powers," the courts are ill-equipped to meddle in these executive functions. *Supra* at A19.

The majority also quotes the Supreme Court's recent decision in *Connick v. Myers*, ... U.S. ....., 103 S.Ct. 1684, 1692, 75 L.Ed.2d 708 (1983), for the proposition that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." However, the Supreme Court, in the same passage, went on to state that such is not the case when the employee has exercised her first amendment rights in a manner which "more substantially involve[s] matters of public concern." *Id.* at 1692-93. Similarly in the past, the Supreme Court has stated that "we must presume that official action was regular and, if erroneous, can best be corrected in other ways"; but the Court was careful to note that such deference is only appropriate "[i]n the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights." *Bishop v. Wood*, 426 U.S. 341, 349-50, 96 S.Ct. 2074, 2079-2080, 48 L.Ed.2d 684 (1976). In the present case, it is my opinion that Hughes' first amendment activities substantially involve matters of public concern. In this regard the holding of *Connick v. Myers* is inapposite; rather, *Givhan* is more on point. In

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7. *See supra* Dissenting Opinion note 3.

Givhan the Supreme Court upheld the first amendment right of a public employee who speaks out "on a matter of general concern, not tied to a personal employment dispute but arranges to do so privately." *Connick v. Myers*, 103 S.Ct. at 1691 n. 8. Hughes' transfer was not tied to any personal employment dispute with his employer. According to Hughes, he was transferred for, among other things, privately informing his superiors that he was investigating possible wrongdoing by members of the Patrol, including Lt. Elmore, and for *instituting* investigations about possible large scale drug smuggling in the area. These are certainly matters of public concern, quite dissimilar to Connick's questionnaire. Thus, although the majority is correct in its assertion that the Patrol does have a large degree of discretion over its personnel matters, the Patrol may not abuse that discretion to stifle the first amendment rights of its employees. *Barrett v. Thomas*, 649 F.2d 1193, 1199-1200 (5th Cir.1981). And it is particularly within the judiciary's ken to stop the executive from exercising its powers in an unconstitutional manner. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-76, 2 L.Ed. 60 (1803). Civil law enforcement is not sufficiently similar to military combat service that the judiciary should abdicate its duty to safeguard first amendment rights. *See Barrett v. Thomas*, 649 F.2d at 1198-99 & n. 9; *Tygrett v. Barry*, 627 F.2d at 1283 & n. 3; *Gasparinetti v. Kerr*, 568 F.2d 311, 315 n. 16 (3d Cir.1977), *cert. denied*, 436 U.S. 903, 98 S.Ct. 2232, 56 L.Ed.2d 401 (1978); *Hanneman v. Breier*, 528 F.2d 750, 754 (7th Cir. 1976). As the Supreme Court has so forcefully stated: "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights," particularly first amendment rights. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967).

2. *Hughes' Interests*

Conversely, the majority has given short shrift to Hughes' first amendment interests. First, the majority fails to take into account Hughes' significant interest in freely associating with others, both politically and socially. The majority does not even mention Hughes' political associations and activities in its discussion of Hughes' countervailing interests, except to intimate that Hughes' association with Trieman was limited to improper on-the-job association. As noted above, the Patrol's own records show that Hughes' on-the-job presence in Mountain View was needed and appreciated. Rather, it was Hughes' off-duty association with Trieman that concerned Hughes' superiors. *See supra* Dissenting Opinion at A50-A51. The importance of the first amendment right to political association should not be so lightly regarded.

The majority's conclusion also undervalues the social worth of Hughes' investigations into the alleged misconduct of his superiors. Hughes' activities were not merely internal or personal squabbles with his superiors, but rather were aimed at matters of significant public concern. *See Connick v. Myers*, 103 S.Ct. at 1689-91. Hughes' investigations of Lt. Elmore's son's drug involvement did not relate solely to Elmore's son. They were also concerned with Lt. Elmore's possible complicity through leaking information about the investigation to his son. The public has a compelling interest in knowing if their officials are guilty of misconduct. *Id.* at 1690-91; *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063 (8th Cir.1979). Hughes' membership in the Patrol places him in a unique position to investigate and expose acts of misconduct within the Patrol. As such, Hughes' investigatory activities deserve substantial protection from retaliatory actions by the Patrol. *Pickering*, 391 U.S. at 572, 88 S.Ct. at 1736; *Atcherson*

v. Siebenmann, 605 F.2d at 1063 ("[T]he creation of disharmony cannot be so feared as to silence the critic who would inform the public of this misbehavior by public officials."); Redish, *The Value of Free Speech*, 130 U.Pa. L.Rev. 591, 611-16 (1982).

In my view, Hughes' first amendment interests are quite substantial. Of course, federal courts should not underestimate the disruption that can be created by an employee's first amendment activities. But the first amendment is not "short-sighted." The first amendment's purpose is to guarantee that "the long term gains of robust debate" are realized. *Porter v. Califano*, 592 F.2d at 779. Just as the public weal demands that police carry out their duties efficiently, the public weal also demands that the police discharge their duties in an honest and competent manner. To ensure that public officials fulfill their duty to the public, the public must be informed of official misconduct. *Williams v. Board of Regents*, 629 F.2d 993, 1003 (5th Cir.1980) ("The falsification of an official document by one official for the protection of another official is such a grave miscarriage of the public trust that such conduct must be disclosed to the public if the *people* are to remain the true sovereigns in this country."), *cert. denied*, 452 U.S. 926, 101 S.Ct. 3063, 69 L.Ed.2d 428 (1981). This case illustrates the short-sighted and debilitating fallacy that regimental efficiency must be placed above freedom. The record shows that the initial decline in morale at Troop "G" was not caused by Hughes' activities. Rather, it was the command staff's reaction to Hughes' activities that caused the troopers to feel uneasy. In fact, morale has worsened since Hughes' departure. The record is replete with testimony of troopers' fear of speaking against their superiors. The troopers have been pressured into sheepish compliance and no

longer feel free to enforce the law equally against all persons. Tr. at 156-57, 160, 171, 173-74, 177. Indeed, at least two state officials have used the Hughes' transfer as a means to quash dissent. Tr. at 157, 320-21, 391. The majority has ignored this effect on the other troopers in weighing Hughes' first amendment interests. Instead, the opinion in effect holds that because Hughes' activities caused dissension, *ipso facto* the Patrol's interests must prevail. Yet, the first amendment "requires the government not just to show that certain employee speech injures the government, but to show that the benefits of preventing the injury actually outweigh the profound benefits of free speech in this society." *Porter v. Califano*, 592 F.2d at 779. Here the chilling effect of the Patrol's reaction to Hughes' "upstart" activities is readily apparent. It is also readily apparent that there is still dissension and disruption within Troop "G." But dissension and disruption are often "the price the first amendment exacts in return for an informed citizenry," *Monsanto v. Quinn*, 674 F.2d at 1001, and they are often the regrettably necessary catalysts for reform aimed at increased governmental accountability and efficiency.

B. *Substantial Motivating Factor*

The majority opinion states that "Hughes' transfer was wholly unrelated to his purported corruption exposing activities because there was no proof that Hughes' allegations were true, there was no showing that Hughes told the Patrol's command staff about his investigations, and the evidence clearly showed that Supt. Whitmer or Maj. Hoffman never knew about or interfered with Hughes' investigations. Besides, the majority says, the real reason Hughes was transferred was to quell dissension and the dissension was only tangentially related to Hughes' investigations. As mentioned above, this reasoning misses

Hughes' point and disregards Hughes' portion of the record evidence. Hughes introduced probative evidence that he did tell others about his investigations and that through Lt. Elmore this information reached Supt. Whitmer and those to whom Supt. Whitmer delegated responsibility in this matter. At the very least Supt. Whitmer knew about Hughes' investigation at Mountain View Airport and about Hughes' investigation of Lt. Elmore and his son. Supt. Whitmer also knew about the state legislator's and Lt. Elmore's bitter reaction to these investigations. I also find it irrelevant that Hughes' investigations might not have exposed any real wrongdoing or that Hughes did not publicly announce the results of these investigations. What is important is that there is substantial evidence that shows Hughes was transferred for *initiating* these investigations. Investigation is the first step in exposing governmental misconduct. It is also the stage of the first amendment process that can be quashed most easily.

More importantly, the majority never weighs Hughes' political associations and activities in its *Pickering* balance, although the record shows that Supt. Whitmer also knew about these activities and knew how his command staff felt about Hughes' involvement with "known politicians." The majority opinion does not take Hughes' political association into account because it concludes that Hughes' off-duty political association with Claud Trieman was not a " 'motivating factor' behind the transfer decision, let alone the 'but for' cause of the transfer decision," *citing Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576. *See supra* Majority Opinion at 1424. Insofar as this statement holds that a *plaintiff* bears the burden of proving that his first amendment activity is the "but for" cause of the government's sanctions in order to prevail, I must disagree. The plaintiff in a first amendment retaliation case need only show

that his first amendment activity was a substantial, or a motivating factor in the government's decision to impose sanctions on him. *Mt. Healthy*, 429 U.S. at 287 & n. 2, 97 S.Ct. at 576 & n. 2. Once this is done, the government has the burden of proving that it would have taken the same action if the plaintiff had not engaged in first amendment activity. In light of the Disciplinary Report which spells out Hughes' off-duty political associations as one of the reasons why he should be transferred, it seems plain that Hughes' political associations were at least a motivating factor in the Patrol's decision to transfer him.

As a final matter, it must be noted that the district court chose to disbelieve the Patrol's proffered reason for Hughes' transfer. Instead, the district court found, as fact, that Hughes' transfer was a disciplinary measure. Hughes' Disciplinary Report lists Hughes' investigations and political association with Trieman as the principal reasons why Hughes should be disciplined. Thus, the district court's finding lends added credence to the conclusion that Hughes' first amendment activities were a substantial motivating factor in the Patrol's decision to transfer Hughes.

C. *The Patrol's Rebuttal*

Once it is determined that Hughes' first amendment interests outweigh the Patrol's interests in efficiency and discipline, the Patrol may not take a second bite of the apple by asserting Hughes' transfer was necessary because Hughes' presence in Troop "G" created intolerable disruption and inefficiencies within the Patrol. This is especially true in light of evidence that shows the dissension was originally created by the command staff's reaction to Hughes' first amendment activities. In presenting a rebuttal argument, the Patrol may rely only on Hughes'

recent, non-protected activities. *Waters v. Chaffin*, 684 F.2d 833, 839 (11th Cir.1982). The present record reveals no such activities that would make a remand fruitless.

IV. WHY A REMAND IS NECESSARY

The majority cogently points out that "[f]ree speech claims are not to be considered in a vacuum, but must be viewed in light of the circumstances and in context with all relevant conditions existing at the time of the asserted free speech activities." *Supra* at A34-A35. I could not agree more. This court has repeatedly emphasized that it cannot and will not review sensitive first amendment issues *de novo*. *See, e.g., Nathanson v. United States*, 702 F.2d 162, 165 (8th Cir.1983); *Brockell v. Norton*, 688 F.2d 588, 593 (8th Cir.1982). The primary reason why I have explored Hughes' evidence in such detail is to show that there still remains a sharp dispute on the facts. The majority, after a thoughtful reading of the record, has adopted the Patrol's version of the truth, and I have presented Hughes' version of the truth. The only way this dispute can be resolved is to have the trier of fact make the necessary credibility determinations and findings of fact. I must emphasize that this does not mean that I accept Hughes' "facts" as proven and true. Truth is subjective. In our trial system of dispute resolution, the official "objective" factual truth is a matter for the trier-of-fact to decide. I would leave the initial task of finding the "objective" factual truth in this case to the district court. A court of appeals is just not able to make credibility determinations from a faceless record. *See British Airways Board v. Port Authority of New York*, 558 F.2d 75, 82 (2d Cir.1977) ("Basic tenets of fairness require that a federal appellate court should not consider an issue involving questions of fact not resolved below.").

The great disparity between the majority's reading of the record and my reading of the record highlights this truism.

Recently, the Second Circuit grappled with a similar situation. In *MacFarlane v. Grasso*, 696 F.2d 217 (2d Cir. 1982), a National Guardsman claimed that he was denied an appointment (promotion) as a stock control officer in the Connecticut Army National Guard. Among other causes of action, the Guardsman alleged that the denial was in retaliation for his exercise of his first amendment rights. It seems that the guardsman wrote a letter to Governor Grasso defending himself against charges that he "buzzed" a nuclear submarine during a training flight. He also addressed letters on the same subject to a Major General Freund within the Guard, the Inspector General of the First United States Army, and the Office of Army Inspector General in Washington, D.C. These letters also complained about the treatment he received from Major General Freund in processing his defense against the "buzzing" charge. The Guardsman also made an oral complaint to an official of the National Guard Bureau.

Subsequently, the Guardsman applied for a promotion with a battalion at Groton, Connecticut. His application was reviewed by Adjutant General Freund (the man he complained to and about in his letter campaign to clear the submarine "buzzing" charge). The application was denied and the Groton depot told the Guardsman that he would not be appointed because the battalion had a policy of promoting from within. The Guardsman sued.

The district court dismissed the first amendment charges for failure to state a claim. The district court said the Guard would have rejected the Guardsman's application without regard to his speech due to its policy

of promotion from within. On appeal the Second Circuit reversed and remanded on the first amendment issue. The court stated that even though there was a strong indication that the Guards' policy of promoting from within would meet the *Mt. Healthy v. Doyle* rebuttal test, the Guardsman still deserved an opportunity to offer his proof as to whether his internal communications were protected speech. This was true even though the plaintiff was a member of a military organization and only spoke about members of that organization to other members of that organization. The court further held that the Guardsman did not give up his first amendment freedoms upon joining the military and that he had the right to have the district court make findings on his first amendment allegations. *See MacFarlane v. Grasso*, 696 F.2d at 224-25.

An analogous situation exists in the present case. As in *MacFarlane*, Hughes, a member of a para-military organization, made disparaging remarks about fellow members of that organization to other members of that organization. As in *MacFarlane*, Hughes' allegations should be aired and resolved in the first instance by the district court. Hughes' allegations that his transfer was ordered in retaliation for his political association and investigatory activities also deserve first amendment scrutiny by the trier of fact. Accordingly, I would adhere to our previous precedent and remand this case to the district court for findings of fact on the first amendment issue. *See Brockell v. Norton*, 688 F.2d at 593-94.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1983

No. 82-1338/1538-WM

William E. Hughes,
Appellee,

vs.

Alan S. Whitmer,
Appellant.

Appeal from the United States District Court for the Western District of Missouri

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

Judges Heaney, Bright, McMillian and Fagg would grant on the first amendment issue only.

September 15, 1983

APPENDIX C

William E. HUGHES, Plaintiff,

v.

Alan S. WHITMER, Defendant.

No. 81-4230-CV-C-5.

United States District Court,
W. D. Missouri, C. D.

Feb. 11, 1982.

Member of the Missouri State Highway Patrol brought action for injunctive relief against transfer from one troop to another. After bench trial, the District Court, Scott O. Wright, J., held that under evidence, transfer was ordered for disciplinary reasons, and where he was denied hearing as required by Missouri law in cases of transfer for disciplinary reasons, there was violation of trooper's rights under Fourteenth Amendment and 1871 civil rights statute, and he was thus entitled to injunctive relief against transfer.

Permanent injunctive relief granted.

* * *

Alex Bartlett, Bartlett & Venters, P.C., Jefferson City, Mo., for plaintiff.

Preston Dean, Asst. Atty. Gen., Jefferson City, Mo., for defendant.

MEMORANDUM AND ORDER

SCOTT O. WRIGHT, District Judge.

The plaintiff, a member of the Missouri State Highway Patrol, brings this action against the defendant, the Super-

intendent of the Missouri State Highway Patrol, seeking injunctive relief against alleged violations of his constitutional and civil rights. In particular, the plaintiff alleges that his transfer from one state highway patrol troop to another troop by order of the defendant violated his First and Fourteenth Amendment rights and rights guaranteed under Sections 1983, 1985, 1986 and 1988 of Title 42 of the United States Code.

At the conclusion of a two-day bench trial, the Court entered its order preliminarily enjoining the defendant from transfering the plaintiff to another troop. The parties agreed that the evidence submitted at the prelininary injunction hearing would constitute the basis for any permanent relief. On review of the evidence and the briefs submitted, the Court permanently enjoins the defendant from issuing his October 16, 1981 order transfering the plaintiff from Troop G to Troop C of the Missouri State Highway Patrol.

I. FINDINGS OF FACT

1. Plaintiff Hughes is a citizen of Missouri and the United States, and is an employee of the Missouri State Highway Patrol.

2. Prior to October 16, 1981, plaintiff was assigned to Troop G of the Patrol. Troop G is headquartered in Willow Springs, Missouri. Plaintiff had been assigned to Troop G for the past eight years.

3. Defendant Whitmer is the appointed Superintendent of the Missouri State Highway Patrol and exercises the powers of that position under the provisions of Missouri law. Section 43.120 *et seq.*, RSMo (1978).

4. Plaintiff and his family own a home in Willow Springs. The home is subject to a mortgage which was

secured at a favorable interest rate. Plaintiff's wife is engaged in a real estate business in Willow Springs.

5. Plaintiff is respected by the Willow Springs community, is regarded as a "good trooper" by his peers, is a dedicated patrolman and enforces the law evenhandedly.

6. On October 16, 1981, the plaintiff was summoned to a meeting at Troop Headquarters. After receipt of the summons, the plaintiff contacted his attorney. His attorney was not permitted to accompany him at the meeting. The plaintiff met with Captain McKee and Major Hoffman at Troop Headquarters in Willow Springs. The plaintiff was told that he was being permanently transferred to Troop C and that he should report to Troop C on October 19. McKee and Hoffman acted in accordance with orders which they had received from the defendant.

7. Plaintiff reported to Troop C on Monday morning, October 19, 1981. Troop C is located in Kirkwood, Missouri. Unlike Willow Springs, Kirkwood is located in an urban environment and is not favorably regarded by rural patrol persons. After reporting to Troop C, plaintiff requested and was granted two weeks of accrued vacation leave.

8. A written transfer order was issued on October 19, 1981. The order stated no reason for the transfer. No written reasons for the transfer have ever been received by the plaintiff.

9. On October 19, 1981, another trooper was transferred from Troop C to Troop G. This trooper, a former resident of Willow Springs who had been previously transferred out of Troop G because of personal problems, was consulted about the transfer and was given until November 1, 1981 to prepare for it.

10. Plaintiff was not transfered in order to remedy an imbalance in Troop C or because he possessed any peculiar skills needed at Troop C.

11. A rapid, non-voluntary transfer of a trooper for reasons other than for promotion or on request of the trooper is regarded by peers of the plaintiff as a disciplinary measure.

12. Prior to the defendant's October 16, 1981 order of transfer, the plaintiff was investigating illegal drug activity in the area covered by Troop G. Plaintiff and other law enforcement persons were informed that the son of Lt. Elmore might be involved in drug trafficking. Lt. Elmore was in charge of the Headquarters Staff at Troop G until October 9, 1981. He was not in the chain of command over the plaintiff.

13. The plaintiff and another trooper conveyed the information about Lt. Elmore's son to Captain McKee. McKee ordered the two to continue the investigation of the reported drug trafficking activities without regard to who might be involved.

14. Plaintiff had a legitimate concern that Lt. Elmore, who was aware of the investigation, might have been responsible for the leaking of information about a drug raid to those under investigation.

15. Lt. Elmore enlisted a private individual to investigate the plaintiff.

16. Plaintiff had information which suggested that a superior officer at Troop G had engaged in the cover-up of an alleged beating of a criminal suspect by two Troop G patrol persons.

17. Plaintiff also acted on information received from an informant that late night flights out of a local airport

were involved in drug trafficking. He requested special airplane surveillance equipment from Captain McKee. McKee approved the surveillance and ordered the equipment. A local state representative, whose private airplane was housed at the airport, complained about the surveillance. The surveillance equipment was never received. The flights ended soon after the request.

18. In early October, 1981, the defendant Whitmer met with Lt. Elmore. The two discussed the transfer of the plaintiff to Troop C. Elmore returned to Willow Springs and told members of the Patrol and others in the community that plaintiff would be transferred. Plaintiff was not told of the transfer.

19. On October 12, 1981, Elmore wrote in a memorandum, which was referenced as "Disciplinary Action—Trooper W. E. Hughes," that the plaintiff should be transferred. Lt. Elmore complained about the plaintiff's investigation of his son's possible involvement in the local drug trafficking problem. That memorandum was endorsed by Lt. Hickman, Captain McKee and the defendant. Neither Elmore, Hickman, McKee, nor the defendant discussed the memorandum with the plaintiff prior to the issuance of the October 16 transfer order. The plaintiff was never given an opportunity to refute any charges made against him.

20. Plaintiff has an exemplary record on the Patrol. Lt. Elmore had, prior to 1981, evaluated the plaintiff highly. In 1981, Lt. Elmore stated that the plaintiff "doesn't seem to understand that the law needs to be bent a little at times."

21. The defendant, as Patrol Superintendent, is vested with authority under Missouri law to provide rules for discipline of Patrol members. The system presently in

force requires formal charges of misconduct to be presented, a hearing, findings, a report and an appeal. Disciplinary transfers are permitted where warranted by the circumstances. *See* Appendix.

II. CONCLUSIONS OF LAW

The parties agree that the defendant's October 16, 1981 order transferring the plaintiff from Troop G to Troop C was issued under color of state law. *See, e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Green v. Dumke*, 480 F.2d 624 (9th Cir. 1973) ("Under color of state law" requirement of Section 1983 is the same as the "state action" requirement of fourteenth amendment) The defendant, as the Superintendent of the Missouri State Highway Patrol, is empowered to prescribe rules and regulations for the discipline of members of the Patrol. Section 43.120 RSMo (1978). As the rules set out in the appendix make manifest, any member of the Patrol who is confronted with the threat of disciplinary action is entitled to written notification of the charges against him, a hearing before a disciplinary board and an appeal to the Superintendent of any disciplinary action taken by the board. Where disciplinary action is warranted, a Patrol member might be fined, demoted, transferred, suspended or dismissed.

Since Missouri freely provides a member of its State Highway Patrol with significant procedural safeguards in the event that the member is accused of conduct which could result in disciplinary action, *see Meachum v. Fano*, 427 U.S. 215, 229, 96 S.Ct. 2532, 2540, 49 L.Ed.2d 451 (1976); *Palmer v. Board of Ed. of City of Chicago*, 603 F.2d 1271, 1274 (7th Cir. 1979); *Arsberry v. Sielaff*, 586 F.2d 37, 46-47 (7th Cir. 1978), this Court is concerned with the personnel business of the State Highway Patrol only to the extent

that it is necessary to assure that the challenged transfer was reached in conformity with relevant procedural requirements. *Doe v. Hampton*, 566 F.2d 265, 271-72 (D.C. Cir. 1977); *Villareal v. EEOC*, Slip Op. 80-0992 (W.D.Mo. 1981). The question to be resolved by this Court is whether the defendant's order transferring the plaintiff from Troop G to Troop C was a disciplinary measure. If the transfer was a disciplinary action, then the plaintiff is entitled to the procedural protections afforded by the laws of Missouri. The question of whether the transfer was ordered for disciplinary reasons is wholly factual.

The weight of the evidence offered at the hearing on the preliminary injunction overwhelmingly establishes that the plaintiff was being disciplined by the defendant when the defendant ordered his transfer from the rural environment of Troop G to the urban environment of Troop C. The plaintiff is respected by the community of Willow Springs and is highly regarded by most of his peers on the Highway Patrol. His unblemished record on the Patrol is exemplary. Testimony offered at the hearing focused on the plaintiff's evenhanded enforcement of the laws of Missouri. The only criticism of the manner in which he has conducted himself—that he "doesn't seem to understand that the law needs to be bent a little at times"—merely enhances his reputation as a highly dedicated officer.

The plaintiff's evenhanded enforcement of the law gave rise to the investigation of the involvement of Lt. Elmore's son in drug trafficking. Captain McKee had ordered the plaintiff to continue the drug trafficking investigation even though a relative of a fellow Patrol member might be implicated. Lt. Elmore was not supportive of the investigation and, to protect his son, may have been responsible for the leak of information concerning a drug raid. The

investigation embarrassed Lt. Elmore before Troop G and before community of Willow Springs.

Another investigation by the plaintiff also implicated superiors within Troop G. The plaintiff suspected and gathered evidence which suggested that a superior officer had engaged in the cover-up of a beating received by a criminal suspect at the hands of two members of the Patrol. He offered evidence with suggested that a report had been altered in order to protect the officers involved.

In one other investigation, a state representative complained about the plaintiff's surveillance of an airport where the representative housed his private airplane. The airport was under surveillance because information had been received concerning the late night delivery of illegal drugs. While there was no evidentiary indication that the representative was involved, the plaintiff asserted that the representative's complaints were responsible for stopping the delivery of surveillance equipment to Troop G.

Many of the patrol persons who testified on behalf of the plaintiff openly expressed their reluctance to testify because they feared that they would be targeted for retaliation by their superior officers. Most who did testify declared their high respect for the plaintiff.

The October 12, 1981 memorandum filed by Lt. Elmore appropriately characterizes the reason for the transfer of the plaintiff. The memorandum, which was referenced as "Disciplinary Action—Trooper W. E. Hughes," outlines Lt. Elmore's complaints about the investigation of his son and about the plaintiff's relationship with a member of the Missouri State Crime Commission. In the days immediately preceding the writing of the memorandum, Lt. Elmore discussed the transfer of the plaintiff from Troop G to Troop C with the defendant. Lt. Elmore told members of

the Patrol that the transfer was to take place. The defendant endorsed the October 12, 1981 memorandum recommending disciplinary action and ordered the plaintiff's transfer on October 16, 1981.

The defendant contends that the transfer was not ordered for disciplinary reasons. He argues that the transfer was ordered to remedy a personality conflict within Troop G. While this argument might encompass one of the reasons for the decision to transfer, the evidence demonstrates that the primary reason was to discipline the plaintiff. The transfer did not remedy an imbalance in the Troop strengths of Troop G or Troop C since a patrolperson was simultaneously transferred from Troop C to Troop G. In addition, there was no evidence which suggested that the plaintiff possessed special skills needed in Troop C. Even members of the Patrol understood that a rapid, involuntary transfer is a tacit disciplinary measure.

The Court is compelled by the weight of the evidence to conclude that the defendant ordered the transfer of the plaintiff for disciplinary reasons. Since the plaintiff was denied a hearing on the disciplinary transfer, as required by Missouri law, he has demonstrated a violation of his fourteenth amendment and Section 1983 rights. The Court does not find a violation of Sections 1985 and 1986 and does not reach the plaintiff's first amendment claims. Accordingly, it is hereby

ORDERED that the defendant is permanently enjoined from issuing his October 16, 1981 order transferring the plaintiff from Troop G to Troop C and must bear the costs of this proceeding. It is further

ORDERED that the parties meet and submit for this Court's approval a sum reflecting the plaintiff's reasonable attorney's fees within twenty (20) days of the date of this order.

APPENDIX

MISSOURI STATE HIGHWAY PATROL

[Seal] GENERAL ORDER	Date of Issue February 20, 1975	Effective Date February 20, 1975	No. V-16-104
Subject COMPLAINT PROCEEDINGS AND DISCIPLINARY RULES	Distribution B	Amends	
Reference Sections 42.120, 43.150 and 43.230 RSMo.	Rescinds Operations Manual: Chapters B-4 and B-5, and Section B-6.010, Par. 1-a		No. of Pages 7

PURPOSE: To establish a procedure for processing complaints against employees, to list the rights of members who have been accused of violating rules and regulations, and to set forth policies and procedures which have been designed to remedy or correct weaknesses in the behavior of members.

I. STATUTORY PROVISIONS

A. Authority to Prescribe Discipline (excerpt from 43.120 RSMo.)

"The superintendent shall prescribe rules for instruction and discipline and make all administrative rules and regulations and fix the hours of duty for the members of the patrol" . . .

B. Removal—Hearing Board (excerpt from 43.150 RSMo.)

"After a probation period of one year the members of the patrol shall be subject to removal only for cause after a formal charge has been filed in

writing before or by the superintendent and upon a finding by a majority of a board of five members appointed by the superintendent. The board shall be composed of one captain, one lieutenant, one sergeant, one patrolman, and one other member of the patrol, of the same rank as the accused member, if there is a member of equivalent rank, at least three of whom must be of the same political party as the accused member. Within thirty days after the petition is filed, the board shall conduct a hearing and report to the superintendent the finding by the majority of the board, whether the charges are true and if sufficiently serious to warrant removal" . . .

C. Duty to Obey and Kinds of Punishment (excerpt from 43.150 RSMo.)

"All lawful rules, regulations, and orders of the superintendent shall be obeyed by the members of the patrol who shall be subject to dismissal as provided or to such lighter punishment as suspension not to exceed thirty days, fine, reduction in rank, forfeiture of pay or otherwise as the superintendent may adjudge."

D. Violation of "Patrol Law" and Punishment (43.230 RSMo.)

"Any member of the patrol who violates any of the provisions of this chapter or commits any act not authorized herein shall be guilty of a misdemeanor and on conviction thereof shall be punished as provided by law for such offense by the court in jurisdiction of which the offense is committed and shall be summarily dismissed from the Patrol."

II. COMPLAINTS: PROCEDURE FOR PROCESSING

A. Initial Action and Investigation

1. An accusation that a member has violated a law, rule, regulation or order shall be reported to the member's troop commander or division director immediately. The investigator will be designated by the superintendent when the violation is of a serious nature.

2. The investigator will contact the complainant in person, if practicable, before proceeding with the investigation. Whenever possible a written statement shall be obtained from the complainant. The complainant should be informed that the allegation will be investigated and that suitable action will be taken.

3. The involved member shall be advised of the complaint and may be directed to relate in writing all facts and circumstances which have direct bearing in the matter. If he is accused of violating any law he shall be accorded the same constitutional rights accorded to any citizen as defined by applicable court ruling. (If he refuses to answer questions specifically related to his performance of official duties or fitness for duty he shall be suspended and made subject to formal charges which could result in his dismissal.) The investigation shall be thorough, and whenever possible, written statements shall be obtained from witnesses interviewed.

B. Investigation Report and Final Action

1. A complete report of the investigator's findings shall be forwarded through official chan-

nels to the superintendent. The investigating officer will classify the complaint as:

a. Unfounded. Allegation is false or not factual.

b. Exonerated. Incident complained of occurred, but was lawful and proper.

c. Not substantiated. Insufficient evidence either to prove or disprove the allegation.

d. Substantiated. The allegation is supported by sufficient evidence.

2. The superintendent will determine what action will be taken and he will direct a member to personally contact the complainant or send a letter to advise the complainant of the results of the investigation.

III. RESPONSIBILITY AND AUTHORITY TO DISCIPLINE

A. Responsibility

1. A supervisor will be responsible for the enforcement of the positive requirements and the expressly prohibited acts set forth in written directives. He will take disciplinary action only against subordinates within his direct line of command.

2. Before a disciplinary measure is recommended or assessed, a superior will attempt to determine whether the violation resulted from deliberate defiance of rules and regulations or inadvertently from ignorance or careless-

ness. Disciplinary action will be more severe if the violation is a willfully defiant act, or has an immoral or dishonest motive. A report shall be made through channels immediately by telephone if the penalty to be recommended is more serious than an oral reprimand. A written report shall follow. The affected member shall be immediately informed of the nature of any recommended disciplinary measure.

B. Authority

1. A member of the rank of corporal or above has authority to:

   a. make an oral or written reprimand.

   b. impose emergency suspension for the remainder of a tour of duty when it appears that such action will be in the best interest of the Patrol.

2. A member of the rank of sargeant or above has authority to:

   a. assess a fine not to exceed $50.00.

   b. recommend disciplinary transfer, suspension (not to exceed 30 days), demotion, or dismissal.

3. A member who has a troop, division or higher command position, has additional authority to:

   a. accept a written resignation and to take immediate steps toward terminating an employee if the employee desires to tender his resignation rather than submit to further investigation and a hearing. The let-

ter of resignation shall be addressed to the superintendent. (Acceptance of resignation will not preclude the superintendent from pursuing criminal charges when such action is warranted.)

b. file formal charges.

IV. RIGHT OF APPEAL

A member may appeal in writing to the superintendent and forward it through channels if he considers a disciplinary measure which has been assessed or recommended for the superintendent's action to be unfounded, unjust or unfair. The member shall prepare any appeal within 72 hours of being informed of a disciplinary measure. (No disciplinary action will be instituted until the appeal has been reviewed and a decision made.)

V. FORMAL CHARGES

A. Preparation of Charges

A charge shall be filed in writing before or by the superintendent when a violation is of such nature that dismissal may be the outcome.

1. The charge will include, but not be limited to, names of complaining or injured persons, date and time of the incident, location of the incident, and the law, rule or regulation allegedly violated. See Appendix A.

2. The superintendent will determine the time and place for the hearing, which time shall not be less than 10 days, nor more than 30 days after the charge was filed.

B. Notification of Charges and Hearing

The accused shall be served immediately with a copy of the charges and the time and place for the hearing. Service shall be in person by a member of the Patrol whenever possible. The accused will be directed to acknowledge in writing his receipt of the charges. He may include in his acknowledgement an answer to the charges.

C. Exoneration of Charges

A member who has been exonerated of formal charges shall be entitled to be reinstated forthwith to his position and to receive back pay for the period of suspension.

VI. IMPLEMENTATION OF DISCIPLINARY MEASURES

A. Fines

A fine will be deducted from the gross salary (before deductions). The director of Personnel will prepare and submit to the director of Finance and Supply a Personnel Action Report; the deduction will be made when the next payroll is developed.

B. Demotions and Disciplinary Transfers

The immediate supervisor of a subordinate who has been demoted, or who has received a disciplinary related transfer, will give special attention to the subordinate; he shall prepare at least 4 reports relative to his attitude and work record. Probationary Progress Report, SHP-62 will be converted for use by marking through the words "probationary", and "recruit", and

"probationer" located on the top portion of the form.

1. The first report will be written within 30 days after the disciplinary action; other reports shall follow—one each 60 days.
2. The original copies of the reports will be forwarded through channels to the superintendent and they shall be placed in the official internal affairs file. Duplicates will be placed on the troop's internal affairs file.

D. Suspension

A member who has been suspended will be removed from the payroll during the period of suspension (or appeal) unless otherwise ordered by the superintendent and he will not have the powers and duties specified in Chapter 43, RSMo. Suspension may be either the first step in the disciplinary process or the penalty assessed. A member under suspension is obligated:

1. to immediately surrender his commission card and all State owned property if directed.
2. to obey all rules and regulations which would affect the conduct and actions of an off duty member.
3. to not wear his uniform during any period of suspension.

E. Dismissal, or Resignation in Lieu of Investigation or Hearing

All responsibilities of command personnel outlined in the directive entitled Termination of Employment shall apply.

VII. HEARING BOARD: POLICY AND PROCEDURE

Members of a hearing board will be selected and will act as prescribed in Section 43.150, RSMo., and as provided in this general order.

A. General Provisions

1. The superintendent will designate a member to pursue the charges against the accused. It will be his duty to prepare the case for presentation and to interrogate witnesses on behalf of the Patrol.

2. No member may sit on a hearing board if he is in any way connected with the case being heard.

3. The accused shall have the right of counsel at all stages of the proceedings and have the right to be heard and interrogate witnesses. He shall not be required to make a statement.

4. All expenses incurred by the defense will be borne by the accused.

5. Failure to appear before a hearing board without permission when scheduled will be considered prima facie evidence of guilt.

6. Members of a hearing board and investigators are forbidden to discuss with any other person the details of the case or the character or reputation of the accused or accuser, except for the specific purpose of determining facts.

B. Presiding Officer

The ranking officer of the hearing board will preside at the hearing. It will be his responsibility to conduct a fair and impartial hearing

and his decisions regarding the procedure will be binding. He will:

1. Arrange for all testimony to be recorded on tape, and by a stenographer. (Two typed copies of the testimony signed by the presiding officer will be presented to the superintendent within 10 days after the hearing.)
2. Make all rulings upon the submission of evidence and motions.
3. Comment upon testimony for the purpose of clarity and brevity.
4. Conduct the hearing with efficiency and dispatch.

C. Order of Procedure

1. Reading of the formal charge(s) by the presiding officer.
2. Presentation of testimony and evidence in support of action taken by the Patrol with respect to matters contested by the member.
3. Presentation of testimony and evidence supporting the member's appeal.
4. Rebuttals and arguments summarizing any part or all of the case.

D. Decision of the Board

The board will act by majority vote. The presiding officer will direct one of the members who voted with the majority to write the opinion of the board. The opinion will include whether the charges were true, and if true, whether serious enough to warrant removal and a recom-

mendation, and a statement of the reasoning whereby the board arrived at its decision.

1. Any member of the board who voted with the majority, and therefore concurs in the results of the decision, but who reached that result by a line of reasoning different from that stated in the opinion prepared, may prepare a concurring opinion setting forth his own line of reasoning.

2. Any member of the board who voted with the minority, shall prepare a dissenting opinion to explain why he believes the case should have been decided differently.

Authenticated by:
JHL P/PR-D

/s/ S. S. Smith
S. S. SMITH, Colonel
Commanding Officer

G. O. V-16-104 Appendix A
For departmental use only FORM S.H.P. 15R1

SAMPLE FORMAL COMPLAINT

MISSOURI STATE HIGHWAY PATROL

Rolla, Missouri

February 7, 1975

Subject: Formal Complaint Against Trooper John A. Doe

To : Commanding Officer
Missouri State Highway Patrol
Jefferson City, Missouri

It is herewith stated that reasonable and substantial cause exists to establish that Trooper John A. Doe has committed an act or acts in violation of the regulations of the Missouri State Highway Patrol, specifically of:

GENERAL ORDER III-2-19, Item II-B-12

It is charged that on January 7, 1975, approximately 9:30 p. m., till 11:45 p. m., while in Patrol uniform and while assigned to routine patrol duty in Phelps County, Trooper Doe drank intoxicating beverages in Club 66, Doolittle, and became intoxicated.

O. A. Drinkard, Captain — OAD:msr

Commanding Troop I

MISSOURI STATE HIGHWAY PATROL

[Seal] GENERAL ORDER	Date of Issue December 3, 1976	Effective Date December 6, 1976	No. V-16-104A
Subject COMPLAINT PROCEDURES AND DISCIPLINARY RULES	Distribution B	Amends General Order V-16-104	
Reference	Rescinds		No. of Pages 2

Item III-B is amended to read:

B. Authority

All officers of the rank of corporal and above have authority to make oral and written reprimands, to impose emergency suspension for the remainder

of a tour of duty when it appears that such action will be in the best interest of the patrol, and to recommend other punishment. Additionally a:

1. corporal may require the forfeiture of 1 regular leave day.
2. sergeant may require the forfeiture of 2 regular leave days.
3. lieutenant may require the forfeiture of 4 regular leave days.
4. member who has a troop division or higher command position may require the forfeiture of 5 regular leave days, file formal charges, accept a written resignation, and take immediate steps toward terminating an employee if the employee desires to tender his resignation rather than submit to further investigation and a hearing. The letter of resignation shall be addressed to the superintendent. (Acceptance of resignation will not preclude the superintendent from pursuing criminal charges when such action is warranted.)

Item VI is amended to read:

VI. IMPLEMENTATION OF DISCIPLINARY MEASURES

A. Forfeiture of Regular Leave Time

A member who has received this punishment will begin working extra days immediately, but will not be required to work more than 4 extra days in one schedule period. He will be compensated for regular meal expenses on the additional days worked.

B. Fines

A fine will be deducted from the gross salary (before deductions). The director of Personnel will prepare and submit to the director of Finance and Supply a Personnel Action Record; deduction will be made when the next payroll is developed.

C. Demotions and Disciplinary Transfers

The immediate supervisor of a subordinate who has been demoted, or who has received a disciplinary transfer, will give special attention to the subordinate; he shall prepare at least 4 reports relative to his attitude and work record. Probationary Progress Report SHP-62 will be converted for use by marking through the words "probationary," and "recruit," and "probationer" located on the top portion of the form.

1. The first report will be written within 30 days after the disciplinary action; other reports shall follow—one each 60 days.
2. The original copies of the reports will be forwarded through channels to the superintendent and they shall be placed in the official internal affairs file. Duplicates will be placed in the troop's internal affairs file.

D. Suspension

A member who has been suspended will be removed from the payroll during the period of suspension (or appeal) unless otherwise ordered by the superintendent and he will not have the powers and duties specified in Chapter 43, RSMo. Suspension may be either the first step in the

disciplinary process or the penalty assessed. A member under suspension is obligated:

1. to immediately surrender his commission card and all State owned property if directed.
2. to obey all rules and regulations which would affect the conduct and actions of an off-duty member.
3. to not wear his uniform during any period of suspension.

E. Dismissal, or Resignation in Lieu of Investigation or Hearing

All responsibilities of command personnel outlined in the directive entitled Termination of Employment shall apply.

Authenticated by:
JRP P/R-S

/s/ S. S. Smith
S. S. SMITH, Colonel
Commanding Officer

APPENDIX D

(Filed April 2, 1982)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 81-4230-CV-C-5

WILLIAM E. HUGHES,
Plaintiff,

vs.

ALAN S. WHITMER,
Defendant.

ORDER

It is hereby

ORDERED that the defendant pay the attorneys' fees of plaintiff in the following measures:

Attorneys' fees:

$6,522.00 to Jack Garrett
$5,127.00 to Alex Bartlett.

Attorneys Expenses:

$431.00 to Jack Garrett
$601.00 to Alex Bartlett.

These fees are reasonable in light of the standards set forth in *Allen v. Amalgamated Transit Union, Local 788*, 554 F.2d 876, 884 (8th Cir. 1977).

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

Kansas City, Mo.
March ....., 1982.

APPENDIX E

WRITTEN STATE HIGHWAY PATROL COMMAND COMMUNICATIONS EFFECTING TRANSFER OF PETITIONER

"MISSOURI STATE HIGHWAY PATROL

Willow Springs, Missouri
October 12, 1981

Subject: Disciplinary action - Trooper W. E. Hughes

To: Commanding Officer, Troop G
Missouri State Highway Patrol
Willow Springs, Missouri

1. In my opinion, the staff of Troop G has lost a great deal of its effectiveness to maintain a proper level of discipline and respect from the members of the troop due to the seemingly uncontrollable actions of Trooper W. E. Hughes, badge number 350, over the last few years.

2. Hughes has, through the use of unfounded accusations and innuendo, brought discredit upon myself and my son. The implications are that my son is involved in pushing narcotics and that I am aiding and abetting him and others in this activity. These stories and rumors have been going around in the troop area for several weeks now.

3. In this particular case, it just seems to be my turn in the barrel. His actions toward other public and private individuals are well known. In my opinion, he has over the last few years brought this department discredit and ridicule through some of his actions.

4. Hughes' close association with a local wealthy industrialist who is heavily involved in statewide politics is

well known. It seems obvious to most of the members of this troop as though Hughes has a free rein to do just about as he pleases.

5. It is hereby recommended that Trooper W. E. Hughes be transferred from this troop for the betterment of the organization.

/s/ E. D. Elmore
E. D. Elmore, Lieutenant EDE:gw

1st End.

Lt.J.M.Hickman, Troop G, M.S.H.P., Willow Springs, Missouri, October 12, 1981

To: C.O., Troop G, M.S.H.P., Willow Springs, Missouri

1. Recently certain accusations have come to light pointed toward the honesty and integrity of Lieutenant E. D. Elmore. These accusations have not been made directly but have arisen through the form of vicious rumors. It appears that Lieutenant Elmore's son, Tom Elmore, has been under investigation by Trooper W. E. Hughes and Trooper L. W. Tuschhoff for some time for selling marijuana. Up to this time, Tom Elmore has not been placed under arrest for any violation by the two officers. This investigation was apparently carried on for some time. I was never consulted by the two officers at anytime, and it appears they did not trust their superior officers.

2. Sometime back after Trooper D. E. Horst was stationed at Mountain View, I talked to their zone sergeant, Sergeant C. R. Emmerson, at which time I advised him that since there was an officer stationed in Mountain View I did not believe it was necessary for Trooper Hughes and Trooper Tuschhoff to spend all their time there but would like to see them over more of the zone. It is commonly

known that Trooper Hughes has become strongly affiliated with a wealthy industrialist and political aspirant who lives in Mountain View. The officers in Troop G have watched and remarked about this, especially as far as promotions are concerned. They have expected him to be promoted through the influence of this political association with no regard for the promotional system.

3. Recently the Superintendent contacted Lieutenant Elmore reference information he had received alleging that a vehicle licensed to Sheriff Clint Reeves of Shannon County may be involved in timber theft in that county. He requested Lieutenant Elmore to have a discreet check made and advise him. Lieutenant Elmore contacted Trooper M. B. Robertson and Corporal L. E. Leonard to make this investigation. He received the information partly by written report and partly by telephone. Lieutenant Elmore transposed this information onto the proper investigation form and forwarded it to General Headquarters. A few days later, Trooper Hughes obtained a copy of this report at our office. Later the sheriff of Shannon County, who had become very angry about the investigation when he learned of it, advised Sergeant W. R. Little that he had a copy of our investigation report. The officers who had made this investigation became very concerned and displeased and strongly suspect that Hughes had passed the report on to the sheriff.

4. In the past, Trooper Hughes has been involved in other unpleasant situations involving citizens of this community. When these were referred to General Headquarters with recommendations, nothing was done. The officers in Troop G all know this, and they will plainly state they doubt any action will be taken on this. An officer told me that he preferred not to work on the same shift as Hughes

because he was afraid he would become Hughes's next victim.

5. In summary, for the betterment of morale of the officers in Troop G, it would be best if Trooper Hughes was transferred from Troop G.

/s/ J. M. Hickman
J. M. Hickman, Lieutenant JMH:gw

2nd End.

C.O., Troop G, M.S.H.P., Willow Springs, Missouri, October 13, 1981

To: C.O., M.S.H.P., Jefferson City, Missouri

1. Trooper Hughes has the ability to be an outstanding member of our organization and there are occasions when he does outstanding work; however, he is a very controversial person and has brought a great amount of criticism to himself as well as the Missouri State Highway Patrol with some of his actions.

2. Trooper Hughes has made a practice of patrolling east of Willow Springs in the Mountain View and Summersville area when no other person was working that area from Zone 1. We approved of this practice due to the fact that the area needed attention, and our member was able to make a great number of arrests and warnings in the area. After a period of time, our member became closely associated with a wealthy industrialist in the Mountain View area. We welcomed the fact that our member was being helpful to a man who was giving great financial assistance by providing industry and jobs to the residents of the Mountain View area; however, it soon became apparent that Hughes was friendly with the businessman due to the fact that he was attempting to become Superintendent of

the Missouri State Highway Patrol and was hopeful that his friend could assist him. Hughes did not succeed in becoming Superintendent; however, he has left the impression with some members of Troop G that he has strong ties with people in high places.

3. Approximately one year ago, Trooper Hughes contacted me and advised that he had received information that an unidentified airplane had been making unscheduled landings at the Mountain View airport late at night or early in the morning; and it was his opinion that the plane was transporting narcotics. It was our member's opinion that several prominent citizens of the area could be connected with this operation. Hughes felt that we should set up monitoring equipment in order that we could monitor the activities at the airport. I advised Hughes that he should monitor the area but cautioned him that he should have very positive proof before he accused any prominent citizen of involvement with drugs. No one was ever arrested in connection with this case.

4. Several months ago, Trooper Hughes and Trooper L. W. Tuschhoff contacted me and stated that Tom Elmore who is the son of Lieutenant E. D. Elmore was associating with known drug pushers in the area, and it was their opinion that Tom Elmore was pushing drugs. They stated that Tom was living in Lieutenant Elmore's home, and it was their opinion that Lieutenant Elmore was informing his son of information which was getting back to the criminal element. Trooper Tuschhoff stated that he made up a story about a house which was going to be searched on a certain night in which friends of Tom Elmore resided who were of questionable character. Tuschhoff advised that this information was given to Lieutenant Elmore, and that night the individuals in question moved from the location.

5. I advised both officers to enforce the law against anyone caught in violation, which included Tom Elmore; however, to date no arrests have been made.

6. Trooper Hughes also complained that one of his friends, namely Deon White of Willow Springs, had a sixteen-year-old daughter who was dating Tom Elmore who was still married but separated from his wife. Hughes advised that the White's daughter had visited in the home of Lieutenant Elmore and that her parents were very upset about this situation.

7. Several weeks ago, Lieutenant Elmore and I discussed the accusations which had been made against him and his son. Lieutenant Elmore was very disturbed about the accusations which were made against him as well as his son. Our member advised that he did not approve of all of his son's actions or friends but insisted that he had talked to Tom, who is twenty-four years of age, about the accusations which were rumored against him and was convinced that his son was not involved in any criminal activity.

8. Trooper Hughes's personal file will reveal two incidents that were very controversial in nature and brought a great amount of criticism on our department. On March 13, 1977, our member observed two Willow Springs schoolteachers in a compromising position in the woods near Cabool. Our member reported this incident directly to the Willow Springs Board of Education without first consulting any Patrol administrative officer. The Board of Education asked for and received the resignations of the schoolteachers. This incident brought a great amount of criticism on the members of the Missouri State Highway Patrol due to the fact that many people felt that our member should be engaged in more important

duties than the one described. I tried to show a degree of leniency with our member in this case due to the fact that his wife was employed in the Willow Springs school system and he would have a personal interest in the case; however, we did receive a great amount of criticism due to this event.

9. On April 13, 1979, a Mrs. Warren Taylor of Willow Springs, Missouri, made a complaint against Trooper Hughes for accusations which he reportedly made against the character of her husband, Warren, to one of Taylor's supervisors for United Parcel Service in St. Louis, Missouri. When I confronted our member concerning this complaint, he denied making the complaint; however, I called United Parcel Service headquarters in St. Louis and determined that our member had made several serious character accusations against Warren Taylor which he could not prove to be true. When I advised the manager of United Parcel Service that I was very disturbed with the conduct of our member and intended to take disciplinary action against him, the supervisor became very apologetic and requested that we show some degree of leniency to Hughes. The United Parcel Service manager stated that Hughes was a former employee of their organization and had given them information in confidence which they had mishandled. I wrote a report on this incident to the Superintendent and recommended that our member be moved to another troop. I was advised by Lieutenant Colonel Van Winkle that the only punishment that the Superintendent would accept was a written reprimand. This punishment was recommended.

10. In conclusion, Trooper Hughes has caused a great amount of turmoil in the troop during the past six years with his controversial activities and political maneuvering.

11. Due to the bitterness that exists between Hughes and Lieutenant Elmore, plus the dissension that has erupted in the troop due to his actions, it is my opinion that Hughes should be moved at State expense from Troop G to another troop for the benefit of all concerned.

V. P. McKee, Captain
Commanding Troop G VPM:gw
cc: Major H. J. Hoffman

3rd End.

C.O., M.S.H.P., Jefferson City, Missouri, October 27, 1981
To: C.O., Troop G, M.S.H.P., Willow Springs, Missouri

1. Trooper Hughes' actions have obviously contributed to dissension in the troop to the extent a strong corrective measure must be taken. After reviewing all the related reports and discussion with staff who support your recommendations, I have concluded the recommended transfer is essential and in the best interest of the Patrol.

2. I recognize the hardships faced by members and their families when transferred, however, I see no workable alternative in this case. Trooper Hughes will be counseled by his district commander for the purpose of preventing a recurrence of these type problems.

3. Effective October 19, 1981, Trooper W. E. Hughes was transferred from Troop G to Troop C.

A. S. WHITMER, Colonel
Commanding Officer ASW:btr
cc: District II Commander"
(Plaintiff's Exhibit 17)

"MISSOURI STATE HIGHWAY PATROL

Willow Springs, Missouri
October 14, 1981

From: Captain V. P. McKee

Subject: Confidential supplement - disciplinary action - Trooper W. E. Hughes

To: Commanding Officer
Missouri State Highway Patrol
Jefferson City, Missouri

1. On Saturday evening, October 10, 1981, I received information from Trooper L. D. Laub, who was on desk duty at Troop G headquarters, that Lieutenant E. D. Elmore had contacted him on that date and advised him that he was conducting his own investigation reference the problems he had encountered with Trooper W. E. Hughes. Laub advised that Elmore told him that Hughes was going to be transferred and that he would be in the troop for eight more years. Elmore reportedly advised Laub that he wanted to know what he would testify to under oath that Hughes had said against him or his son, Tom Elmore, due to the fact that he planned to bring a civil suit against Trooper Hughes. Trooper Laub stated that Lieutenant Elmore talked with several members of Troop G concerning their testimony, and he knew that at least two members of his zone, Sergeant C. R. Emmerson and Corporal M. B. Pace were very upset over the incident. Trooper Laub requested that his information be kept confidential due to the fact that he did not want to have trouble with anyone.

2. I advised Laub that I would treat his information as confidential; however, I was not aware that Elmore was conducting an investigation and that I did not approve of his action in this case.

3. On Tuesday, October 13, 1981, I was in contact with Elmore and advised him that I had received information that he had contacted several members reference information that they had heard from Hughes against him or his son.

4. Lieutenant Elmore advised me that he did contact several members of Troop G and asked them to tell him what information they had heard Hughes say against him or Tom due to the fact that he planned to bring a civil action against Hughes for defamation of his character, and several members of the troop would be required to give depositions. Elmore stated that he did not intend to pursue the matter if Hughes was transferred from the troop.

* * *

V. P. McKEE, Captain
Commanding Troop G VPM:gw"

* * *

(Plaintiff's Exhibit 18)

"MISSOURI STATE HIGHWAY PATROL

PERSONNEL ORDER	Date of Issue	No.
	October 19, 1981	187-81

SUBJECT
TRANSFERS - RESIGNATIONS

* * *

2. Effective October 19, 1981, Trooper William E. Hughes, badge #350, Troop G, Willow Springs, will transfer, at State expense and with motor equipment, from Troop G to Troop C, Kirkwood.

* * *

/s/ A. S. WHITMER, Colonel
Commanding Officer"

(Plaintiff's Exhibit 1A)

APPENDIX F

EXCERPTS FROM COMPLAINT FILED BY PETITIONER IN DISTRICT COURT

"COMPLAINT

Comes now the Plaintiff, and for cause of action against the Defendant, states as follows:

* * *

4. Plaintiff has been assigned and stationed as a member of the Missouri State Highway Patrol at Troop G of the Patrol in Willow Springs in Howell County, Missouri, for over eight years. Plaintiff owns a home at Willow Springs, his wife is employed in the Willow Springs area, and Plaintiff has children who are enrolled at the Willow Springs High School.

5. Plaintiff possesses all of the statutory qualifications to be and continue to be a member of the Missouri State Highway Patrol. Plaintiff has performed all of the duties and responsibilities which have been lawfully assigned by the Defendant, either directly or pursuant to the established procedures of the Missouri State Highway Patrol, to the Plaintiff to perform in his employment as a member of the Missouri State Highway Patrol. Plaintiff has heretofore had and enjoyed a good reputation with respect to his career as a member of the Missouri State Highway Patrol, and Plaintiff has not previously been subjected to any stigma in connection with his work as a respected law enforcement officer and member of the Missouri State Highway Patrol.

6. Plaintiff has not taken any action in connection with his employment that would justify any disciplinary action to be taken with respect to him by the Defendant

or any other superior officer in the Missouri State Highway Patrol.

7. Notwithstanding the foregoing matters hereinabove set forth, Plaintiff has received an order from Defendant Whitmer directing Plaintiff's transfer from Troop G of the Patrol at Willow Springs to Troop C of the Patrol at Kirkwood. On Friday, October 16, 1981, Plaintiff was orally advised that he was being transferred effective Monday, October 19, 1981. Such order was issued without prior notice was issued without notice of any disciplinary charges, and was issued without a hearing or other opportunity to be heard. Plaintiff did not request to be transferred from Willow Springs to Kirkwood, and Plaintiff does not wish to move from Willow Springs to Kirkwood when there is no proper and lawful reason therefor. Since that time Plaintiff has taken vacation and is now scheduled to report to Kirkwood on November 3, 1981.

8. Plaintiff states that no proper and lawful reason exists for the Defendant to order or direct the transfer of Plaintiff from Willow Springs to Kirkwood. Rather than being a transfer effected because of an oversupply of members of the Patrol at Willow Springs and an undersupply of Patrol members at Kirkwood, the transfer is in fact a disciplinary action. Defendant Whitmer has not followed the extant procedures in the Patrol for notices and hearings with respect to disciplinary actions against members of the Patrol. The action of Defendant Whitmer has been precipitated by a situation involving certain personnel of the Patrol at Troop G and other persons - a situation in which Plaintiff is in no manner at fault and for which Plaintiff is not responsible. For the good of the Patrol Plaintiff does not now in this Complaint allege the details of the situation (hereinafter sometimes "situation") to which he refers in order to keep

such matter from being detailed in the public record and therefore compound problems to the Patrol which have arisen therefrom. Such "situation" has, however, come to be known by other personnel of the Missouri State Highway Patrol, by others engaged in law enforcement activities, by persons within the community and by other persons. By reason of the existence of the "situation" and the quickly ordered transfer to Kirkwood, such has cast a stigma upon Plaintiff and his future career with the Patrol inasmuch as Plaintiff has and will continue to be characterized as being at fault in the "situation" when such is not in fact the case. The Defendant knew or reasonably should have known that such stigma would under the circumstances result from the transfer order.

9. Plaintiff states that requiring the Plaintiff to transfer from Willow Springs to Kirkwood will require the Plaintiff and his family to incur and sustain financial losses and will otherwise be disruptive to Plaintiff and his family - all without proper cause or reason. Plainitff by reason of such ordered transfer will be denied a valuable government benefit - such deprivation being effected by the Defendant in violation of his constitutional and civil rights.

10. Plaintiff further believes and alleges that such transfer order is a result of the exercise by Plaintiff of his First Amendment rights in connection with the "situation" and in connection with other matters and is therefore improper and unlawful for those reasons as well.

11. Plaintiff states that even though he has attempted to make known his objections to the ordered transfer and the stigma which has been caused to his reputation and career thereby, he has still not been able to secure either a recission of said order or a full and fair hearing with respect thereto.

12. Plaintiff states that the required transfer to Kirkwood without a proper full and fair hearing is violative of the following constitutional protections:

A. Such action violates his rights to a full and fair hearing to clear his name and reputation of the stigma attached as hereinabove alleged - in violation of his rights to due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

B. Such action is in fact disciplinary and deprives Plaintiff of substantial valuable governmental benefits and will cause him financial loss and personal hardship without the Plaintiff first having been given proper notice of disciplinary charges against him, in violation of having been afforded a full and fair hearing following proper procedures before an impartial fact finder and having been determined to have violated some established and lawful standard of conduct - in violation of his rights to procedural and substantive due process as guaranteed by the Fourteenth Amendment to the United States Constitution and in deprivation of his property rights secured by the Fifth and Fourteenth Amendments to the United States Constitution.

C. Such action is taken as a result of the Plaintiff's exercise of his First Amendment rights under the United States Constitution and is therefore invalid.

D. Such action without having been afforded a hearing is discriminatory and violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution inasmuch as there are extant disciplinary hearing procedures established and followed for members of the Missouri State Highway Patrol and here such action was arbitrarily and discriminatorily taken without following those procedures."

* * *

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within the jurisdiction the equal protection of the laws.

* * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

IV. 42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

V. Subsection 1 of Section 43.120, Revised Statutes of Missouri:

"1. The superintendent shall prescribe rules for instruction and discipline and make all administrative rules and regulations and fix the hours of duty for the members of the patrol. He shall divide the state into districts and assign members of the patrol to such districts in the manner as he deems proper to carry

APPENDIX G

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

This case involves the following constitutional provisions, statutes and regulations:

I. First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

II. Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

III. Sections 1 and 5 of the Fourteenth Amendment to the Constitution of the United States:

out the purposes of this chapter. He shall have authority in his discretion to call members of the patrol from one district to another."

VI. Section 43.150, Revised Statutes of Missouri:

"After a probation period of one year the members of the patrol shall be subject to removal only for cause after a formal charge has been filed in writing before or by the superintendent and upon a finding by a majority of a board of five members appointed by the superintendent. The board shall be composed of one captain, one lieutenant, one sergeant, one patrolman, and one other member of the patrol, of the same rank as the accused member, if there is a member of equivalent rank, at least three of whom must be of the same political party as the accused member. Within thirty days after the petition is filed, the board shall conduct a hearing and report to the superintendent the finding by the majority of the board, whether the charges are true and if sufficiently serious to warrant removal. All lawful rules, regulations, and orders of the superintendent shall be obeyed by the members of the patrol who shall be subject to dismissal as provided or to such lighter punishment as suspension not to exceed thirty days, fine, reduction in rank, forfeiture of pay or otherwise as the superintendent may adjudge."

VII. Missouri State Highway Patrol General Order No. V-16-104. This regulation issued by the Superintendent of the Missouri State Highway Patrol is set forth in its entirety at the end of the February 11, 1980, Memorandum and Order of the District Court, which is reprinted in Appendix C, supra.

APPENDIX H

DISCIPLINARY TRANSFER PROCEEDINGS RE CORPORAL EDDIE HILL

In 1982 Highway Patrol Corporal Eddie Hill, who was assigned to Troop A at Lees Summit, Missouri, was ordered assigned to another Troop in another geographical area of Missouri. The transfer was ordered as a disciplinary action in Personnel Order 112-82 of Missouri State Highway Patrol.

Corporal Hill protested the disciplinary transfer and a Disciplinary Appeal Board was convened by the Superintendent of the Patrol. The Disciplinary Appeal Board was constituted as set forth in Section 43.150, RSMo, and Missouri State Highway Patrol General Order No. V-16-104.

The actions of the Disciplinary Appeal Board and the Superintendent of the Patrol are reflected in Personnel Order No. 157-82 dated November 12, 1982, which stated:

"1. General (sic) Order 112-82 is rescinded.

2. On November 10, 1982, a Disciplinary Appeal Board convened to hear the appeal of Corporal E. M. Hill of the disciplinary action set forth in Personnel Order 112-82. The Disciplinary Appeal Board found that Corporal Hill had violated:

a. General Order III-2-134, Item II-A-11

b. General Order III-2-134, Item II-B-1

c. General Order III-1-20, Item II-B-2 (sic)

The Board found that Corporal Hill had not violated General Order III-2-134, Item II-B-2.

3. The Board further found that Corporal Hill's violation of the specified General Orders were not sufficiently serious to warrant the disciplinary action set forth in Personnel Order 112-82. The Board's recommendations are accepted and Corporal Hill will forfeit five leave days. He will also be reassigned from Zone 14 to the Troop A desk.

/s/ H. J. Hoffman
H. J. Hoffman, Colonel
Commanding Officer"

APPENDIX I

EXCERPTS FROM HICKS v. McKEE, ET AL.

The "Cover-up of the Beating of an Arrestee" situation (see Statement of the Case, *supra*) which came to light during the November 1981 trial in this case became the subject of a § 1983 suit for damages which was filed by the arrestee, Ronald Hicks, and his wife in the United States District Court for the Western District of Missouri, Southern Division. That case was styled *Ronald Hicks and Fonda Hicks v. Captain V. P. McKee, Lieutenant Jefferson Hickman, Trooper Archie Dunn, Trooper Robert Lee, et al.*, Case No. 82-3025-CV-S-4.

Extensive depositions were taken in that case, and finally polygraph examinations of Troopers Dunn and Lee (the two troopers involved in the alleged beating incident) were ordered by the Patrol under the provisions of General Orders of the Patrol requiring members of the Patrol to submit to examinations in certain instances. Before Trooper Dunn began to take the test, he confessed to what had happened to Mr. Hicks. Thereafter, Trooper Lee promptly resigned from the Patrol; Trooper Dunn was suspended for a period of time and then demoted; and Captain McKee and Lt. Hickman took early retirement. The Missouri Attorney General, realizing there was substance to the prisoner abuse charges, without publicity, settled the claims against McKee, Hickman and the two troopers before trial by causing approximately $77,000.00 to be paid from the States' tort defense fund to Hicks.

At the trial of this case, Capt. McKee and Lt. Hickman denied the "cover up" allegations. The District

Judge in effect chose to believe the testimony of Petitioner Hughes and a Sgt. Zorsch and to not believe Captain McKee and Lt. Hickman. 537 F. Supp. 96 and 97. The majority opinion of the Court of Appeals, without the benefit of being able to assess credibility, chose to believe McKee and Hickman rather than Hughes. 714 F.2d at 1423. In addtion to the foregoing summary of developments in the *Hicks* case, the following excerpts of sworn deposition testimony in *Hicks* case substantiate the credibility findings of the District Judge and the soundness of the reasoning in the Court of Appeals dissenting opinion which would have remanded the cause for further consideration on the First Amendment issues.

Deposition of Lt. Edward Elmore, taken on April 12, 1982:

"Q. Lieutenant Elmore, would you please state your full name.

A. Edward D. Elmore.

* * *

Q. Now, your rank is lieutenant?

A. Yes.

* * *

Q. Prior to that, you were stationed at Troop G in Willow Springs?

A. Yes.

Q. How long were you there?

A. Twenty-four years.

* * *

Q. Okay. How long have you known Sergeant Mike Zorsch?

A. Ever since he came on the department.

Q. About 17 years, right?

A. Seventeen years.

Q. Have you found him to be an honest, truthful trooper?

A. Yes, I have.

* * *

Q. Now, did you have occasion to learn of an alleged beating involving Troopers Dunn and Lee and a gentleman by the name of Ronald Hicks?

A. Yes.

* * *

Q. You have learned, have you not, that no physical violence or physical force report was prepared, haven't you?

A. None that I know of.

Q. And that would, of course, be a violation of your own rules and regulations?

A. Yes.

* * *

Q. Now, Zorsch had told you that he had discovered in talking to Lee and Dunn that there was physical contact and that Bob Lee had made certain incriminating statements; right?

A. Yes.

Q. He had told you, had he not, that Bob Lee told him; in other words, Bob Lee told Zorsch, that he had kicked the shit out of Hicks; right?

A. This is my understanding from talking to Zorsch that he told him he had worked him over good and he was going to need a seeing-eye dog for a couple of weeks.

Q. That would be Hicks would need a seeing-eye dog for a couple of weeks?

A. Yes.

* * *

Q. Who was present?

A. Zorsch, Sergeant Zorsch, Corporal—or Trooper Mitchell at the time, Trooper Mitchell, Sergeant Zorsch, myself and Lieutenant Hickman along with the captain.

Q. And the captain?

A. Yeah.

Q. Captain McKee? Did you learn at that time that Captain McKee had decided basically not to include in the official report the material supplied by Corporal Mitchell and a major portion of the report supplied by Corporal Mitchell and a major portion of the report supplied by Sergeant Zorsch?

A. When he called us back in I never—I don't know anything about that particular part of it. When he called us back in there he said—the captain talked first. He said, "Here it is." He said, "These boys took this prisoner from the deputy sheriff," said, "he was under arrest, he was drunk, he was handcuffed with his hands behind his back and while they were taking charge of the prisoner he fell on his face and this is how he got his injuries."

Q. Of course, in your talking with Lee and in talking with Zorsch, you knew that wasn't true, didn't you?

A. Not in my opinion.

Q. In your opinion, that was false?

A. Yes.

Q. As a matter of fact, in talking with McKee it was quite obvious to you that Captain McKee knew that, too; right?

A. I feel like he did.

Q. Yeah. As a matter of fact, additional conversation occurred in that meeting, did it not, between you and Hickman and McKee and Zorsch and Mitchell. Did Hickman say anything—well, first of all, were you pleased with what the captain had stated?

A. Not at all. I don't think that he considered the whole thing at all. But this was after talking with these two and everybody involved, all the uniformed members of our department that were involved, this is the decision he arrived at. He said, "Someone's got to make the decision, and this is my decision as to what happened."

Q. Did you blow your stack, basically?

A. Well, I thought it was a little unusual for him to take that complete turnaround on their statements as to what happened.

And I said, "Is this what you really believe happened or is this what you're going to assume happened?"

He said, "Somebody's got to make the decision and," he said, "I've made it." And that was his statement to me.

Q. Okay. Did Lieutenant Hickman say anything? Did you ask Lieutenant Hickman whether he believed this?

A. No, he got up then and said, "Well, I don't think you boys are trying to help these guys at all. In fact, I don't know what you're trying to do." And he got rather red faced. And I said, "Well, Jeff, is this—are you of the opinion that—do you actually believe that this is what's happened or is this what you want to say happened?"

He said, "Well, if you want to know what I really think happened," he said, "I think they beat the shit out of him."

Deposition of Corporal Garrell Mitchell, taken on April 12, 1982:

"Q. Would you please state your full name, sir.

A. Garrell L. Mitchell.

Q. Your rank with the Missouri State Highway Patrol?

A. Corporal.

* * *

Q. And I'll show you what's been marked as Plaintiffs' Exhibit Number 19 and ask you if that's a copy of the report you prepared?

A. Yes, it is.

Q. Does it bear your signature?

A. Yes.

Q. Is that the original?

A. Would be a copy of the original.

Q. But that's not the original, is it?

A. No.

Q. Now, do you know what happened to the original?

A. I heard that it was submitted in federal court in Kansas City over Bill Hughes's lawsuit with the patrol.

Q. Isn't it true that that original was thrown into a trash can and Bill Hughes retrieved it?

A. I understand that Bill Hughes said he retrieved it from a trash can.

* * *

Q. Now, if Plaintiffs' Exhibit 19 the entire extent of any notes or memorandums that you compiled in connection with your investigation?

A. Yes. When I was asked to write the report I just sat down and wrote it.

Q. And it's accurate?

A. Yes.

Q. All right. You've since learned that an official report was prepared over the signature of the captain and of the investigating people during the month of June, 1981?

A. Yes.

Q. You've seen that report?

A. Yes.

Q. You've seen that your portion just wasn't in it, didn't your?

A. No, it wasn't in it.

* * *

Q. Since June 12, 1981, when you found out your report wasn't included in the official report and the statement made by Trooper Lee wasn't in that official report, that statement that he struck Hicks, were you curious as to why that wasn't in the official report?

A. To a certain degree I was.

Q. You were curious enough to inquire, weren't you?

A. Yes, I inquired.

Q. As a matter of fact, you had a question as to why in the world unless they thought you were lying, why Hickman and McKee didn't include it in the official report?

A. I felt that they thought I was lying on it.

Q. So you went to see Hickman, didn't you?

A. Yes, I did.

Q. Did you ask him where is my report, why isn't it in the official report?

A. Yes, I did.

Q. And what did he say?

A. He said he didn't think that mine had made it.

Q. He said, "I don't think your report made it"?

* * *

Q. And you determined in talking to Lieutenant Hickman that McKee and Hickman had decided just to use a different version than the version that you and Zorsch had obtained from Trooper Lee; right?

A. Well, I know they didn't use my version.

Q. Well, you've read the report submitted by Hickman and McKee, haven't you?

A. Yes.

Q. That doesn't include anything in there about what he told Sergeant Zorsch in your presence, does it?

A. No, it doesn't.

Q. So the part where Trooper Lee admitted striking Hicks was omitted from the report by the order of Hickman and McKee; right?

A. Well, it was omitted.

* * *

Deposition of Sgt. Mike Zorsch, taken on April 12, 1982:

"Q. Sergeant, would you please state your full name.

A. Sergeant Mike Zorsch.

* * *

Q. Your occupation or profession?

A. I'm zone sergeant with the highway patrol.

Q. Missouri State Highway Patrol?

A. Yes.

Q. And how long have you been employed as a Missouri State Highway Patrolman?

A. Be 17 years in October.

* * *

Q. Well, sir, did you then—did you discuss it with Captain McKee for a period of time there that his version and the version given to you by Bob Lee were inconsistent?

A. I told him—I asked him what he wanted to do with this thing.

Q. And that thing is Exhibit Number 18?

A. Yes, sir.

Q. And what did he tell you he wanted you to do with Exhibit Number 18?

A. He said, whatever you think, or something to that effect. I don't remember exactly.

And I said, "Well, it doesn't say anything like what you're going with." I said, "Do you want something like that turned in?"

And he just kind of shrugged his shoulders and I walked out of his room. And I was upset, I'll be truthful with you, because I felt he thought I was lying about it.

Q. Okay. You had already turned in Exhibit 18, hadn't you?

A. Yes.

Q. All right. Go on. You were upset?

A. I said, "What do you want done with Mitchell's report?"

And he said, "We don't need Mitchell's report, it's going to be thrown in the trash."

* * *

Q. All those portions relating to Bob Lee's admissions of slapping the boy, slapping Hicks, kicking Hicks, all that was ordered to be deleted by Lieutenant Hickman; right?

A. Yes.

Q. Did you ask why you were required to do that?

A. No, sir.

Q. You realized that the truth was not going to be submitted to the headquarters in Jeff City?

A. That's correct.

Q. Did you tell Hickman that?

A. Yes, sir, I did.

Q. What did he say?

A. He said—well, when he and the captain and I were all in the office at one time he said, "We know what happened out there, and this is the way we're going to go."

• • •

Q. Well, did you get the impression they knew one thing happened out there but they were going to go a different route?

A. Yes, sir.

Q. It was quite obvious to you, wasn't it?

A. Yes.

Q. After reading your report they knew that a beating had occurred and that injury had been inflicted by state troopers, but they were going to take the story that the subject had fallen down and injured himself?

A. Yes, sir.

Q. And you knew, sir, that that was not true?

A. That's correct.

Q. And they, likewise, knew it wasn't true, didn't they?

A. Yes, they did.

• • •

Q. Now, when you talked to Bob Lee, Trooper Lee, about what occurred, isn't it true that instead of saying that he roughed the Hicks boy up, he used different language than that, didn't he?

A. Yes.

Q. And we'll get to why the report doesn't reflect it properly later, but what did he say to you, sir?

A. He said, "We beat the shit out of him."

Q. Now, did he ever say anything else about the extent of the injuries, how Hicks reacted afterwards?

A. Oh, sometime in there he mentioned he would have to have a seeing-eye dog for the next couple of weeks.

* * *

Q. Sergeant, I don't want you to sugar coat this. When you learned that Captain McKee was going to use a different report than what you had determined the truth to be, you became quite irate, didn't you?

A. Yes.

Q. Did you and Captain McKee have words?

A. Yes.

Q. I want to know to the best of your recollection, I don't care what words were used, I want your best recollection as to what was said by him to you and you to him.

A. Well, after he called Lieutenant Elmore and myself in there that day that Trooper Dunn and Lee had just come out and he told me that we were going to go with the story that Mr. Hicks had fallen down and received injuries that way, and I told him I—I just asked him, "What the hell are you doing?" And I said, "Don't you believe a damn word I've said or what we've said in here?" And Lieutenant Elmore was present. And that's when Lieutenant Hickman said, "We know what the hell happened, this is the way we're going to go."

And about that time he said, "Now, that's all."

Q. McKee said that?

A. Yes. And I walked out of the room and I was very upset, yes, because I felt like at the time, and I still feel like at the time that they were doing me wrong. He had sent me out to investigate that."

* * *

Deposition of Lt. Harold W. Battmer, taken on June 22, 1982:

"Q. Would you please state your full name.

A. Harold W. Battmer, B-a-t-t-m-e-r.

Q. And is the rank of lieutenant?

A. Yes, sir.

* * *

Q. Lieutenant Battmer, I have marked here Plaintiff's Exhibits I, which purports to be an interview or a transcribed copy of an interview between you and Archie Dunn and Sergeant Dave LePage; is that correct?

A. Yes, sir.

Q. Dave LePage is the—he's with the Missouri State Highway Patrol and he's a polygraph examiner, is he not?

A. Yes, sir, that's correct.

* * *

Q. Now this interview was conducted on June 3, 1982; is that correct?

A. Yes, sir.

Q. Was that the date that Archie Dunn was scheduled to submit to a polygraph examination?

A. Yes, sir.

Q. Was a polygraph examination administered to Trooper Dunn?

A. No, sir.

Q. Why?

A. During the pretest interview by the Kansas City polygraphist, Trooper Dunn told this gentleman what actually occurred during the arrest of Mr. Hicks.

* * *

Q. Okay. Now, in talking with Trooper Dunn, Trooper Dunn described the fact that Hicks had been knocked to the ground and received a beating there on his farm; is that correct?

A. Yes, sir.

Q. Administered by Trooper Lee; right?

A. Yes, sir.

Q. And that this beating took place over a period of time, it wasn't a one-strike situation; in other words, it was more than a second, it was—I'm not saying it lasted an hour, but it was a period of time where a confrontation between Hicks and Lee occurred; correct?

A. Yes, sir.

* * *

Q. What's the next thing that happened involving you and this case?

A. After we finished with Trooper Dunn we then the next day talked with Trooper Lee. Trooper Lee was required to submit to a polygraph examination.

* * *

Q. And was a polygraph examination administered to Trooper Lee?

A. Yes, sir.

Q. And by whom?

A. The test was administered by Sergeant LePage at the Kansas City Polygraph Unit.

Q. I assume that the same procedure was used with Trooper Lee as was originally intended to be used with Hicks and Dunn; that is, a pretest interview to formulate questions and then the test itself; correct?

A. Yes, sir.

Q. Did Trooper Lee pass the test?

A. No, sir.

* * *

Q. All right. Now, after Lee gave this story, what happened?

A. Trooper Lee resigned as a member of the Missouri Highway Patrol.

Q. Is that a reversible situation or is that it?

A. That's it.

Q. No hearings?

A. No, sir.

Q. All right. Turned in his badge, gun and car?

A. Yes, sir.

Q. Okay. And with regard to Trooper Dunn, what transpired there?

A. On June the 7th I met with Trooper Dunn at the Troop D satellite station in Carthage, Missouri, in regards to another matter not connected with the

Hicks incident. And about halfway through that interview I received a call from Major Hoffman at General Headquarters, and he told me that the Colonel requested that Trooper Dunn be suspended at that time. I called Trooper Dunn back into the room and told him I was speaking for Major Hoffman and Colonel Whitmer, that at that time I was suspending him as a member of the Missouri State Highway Patrol. He was required to relinquish all state owned property that he had in his possession at that time and he was sent home.

Q. Okay. Hasn't worked for the Missouri State Highway Patrol since then, has he?

A. No, sir.

Q. Your investigation in this matter, do you consider it concluded, your internal investigation?

A. There still is going to be—Archie Dunn has requested a board hearing, which is set for July the 7th at General Headquarters."

No. 83-793

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM E. HUGHES,
Petitioner,

v.

ALAN S. WHITMER, Superintendent,
Missouri State Highway Patrol,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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January, 1984

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri 314/449-4163

QUESTIONS PRESENTED

1. Whether the appellate court's decision to address and decide the issues relating to the petitioner's First Amendment claims even though the district court had not reached these issues in its original opinion, is in conflict with the applicable authority of this or any other federal court?

2. Whether the appellate court was correctly following the precedent set down by this Court when it proceedeed to decide the petitioner's First Amendment claims on the basis that the record before it was clearly sufficient to dispose of the question, the record was susceptible to only one *reasonable* interpretation on the issue, and effective judicial administration demanded such action?

3. Whether the appellate court correctly applied the appropriate precedent of this Court to the facts of this case when it determined that based on the record before it the respondent had not violated the petitioner's First Amendment rights when he transferred him from one troop area of the highway patrol to another?

4. Whether the appellate court correctly interpreted and applied the controlling precedent of this Court when it decided that the petitioner did not possess either a property or liberty interest entitling him to a specific assignment at a particular troop within the highway patrol, and thus rejected his contention that he was entitled to a due process hearing prior to his transfer to another troop area?

TABLE OF CONTENTS

Table of Authorities

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The respondent, Alan S. Whitmer, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported as *Hughes* v. *Whitmer*, 714 F.2d 1407 (8th Cir. 1982) and it reversed the opinion and judgment of the United States District Court for the Western District of Missouri in *Hughes* v. *Whitmer*, 537 F.Supp. 93 (W.D.Mo. 1982).

STATEMENT OF THE CASE

Respondent believes that the majority opinion of the appellate court sets forth a complete and concise recitation of the facts pertinent to this case. Unlike the statement of the case presented by the petitioner which lifts matters out of context, distorts the record before the appellate court, and engages in the ethically questionable practice of attempting to bring before this Court matters *outside* the record in this case, Judge Gibson's presentation sets forth the pertinent facts relevant to this case. The appellate court set forth the record in the instant case as follows:

Trooper Hughes has been a member of the Patrol since 1970 and has spent almost all of his career assigned to Troop "G." Troop "G" is headquartered in Willow Springs, Missouri, and its members patrol the highways in the surrounding nine counties of south central Missouri. Hughes and his family have lived in Willow Springs during Hughes' ten-year tenure in Troop "G."

On Friday afternoon, October 16, 1981, Hughes was summoned to Troop "G" headquarters. When he arrived, Hughes was ushered into Captain McKee's office and told by Major Hoffman of Patrol headquarters that he was being transferred to Troop "C," at state expense, effective Monday, October 19, 1981. Troop "C" is a relatively urban assignment encompassing the counties surrounding the City of St. Louis. Its headquarters are in Kirkwood, Missouri, which is some 200 miles from Willow Springs.

Hughes reported for duty at Troop "C" on Monday, October 19, 1981, as ordered. Hughes was never notified officially of any complaint against him prior to the Superintendent's decision to order the transfer. Nor was Hughes given an opportunity to meet any of the charges against him or refute any of the factors which entered into the

Superintendent's decision to transfer him. Hughes still has not received written reasons for his transfer. His transfer order merely states that he is being transferred at state expense from Troop "G" to Troop "C" effective October 19, 1981.

Superintendent Whitmer, the ultimate transferring authority, Major Hoffman, whom the Superintendent ultimately relied upon in making the transfer decision, and Captain McKee of Troop "G" testified that the transfer was made to resolve a debilitating troop morale problem resulting from an intense personality dispute between Hughes and Lt. Elmore. Lt. Elmore was in charge of staff functions at Troop "G" headquarters but was not in the chain of command over Hughes.

Major Hoffman, who conducted interviews with a number of Troop "G" patrolmen, concluded that the major source of the friction between Hughes and Elmore was Hughes' investigation of Elmore's twenty-four-year-old son. Hughes suspected that Elmore's son was involved in illicit drug trafficking. Hughes reported these suspicions to Captain McKee, who in turn told Hughes to continue the investigation. As Hughes continued his investigation, he suspected that Lt. Elmore was leaking information about the investigation to his son. Hughes apparently told other Troop "G" officers about his suspicions regarding Lt. Elmore and made accusations regarding Elmore's son's involvement in drug activities. Hughes also told a Willow Springs neighbor that the neighbor's sixteen-year-old daughter had been seen at Lt. Elmore's house with Elmore's son. Elmore's son was married to another woman at the time. During their interviews with Hoffman, various Troop "G" officers expressed the view that Hughes had become too personally involved in Elmore's family affairs, hindering his own job performance and causing disharmony

within the Troop. After learning about Hughes' various investigations and accusations, Lt. Elmore reciprocated by conducting his own investigation of Hughes and by indicating his intention to file a defamation of character suit against Hughes.

At trial Hughes testified that he was transferred in retaliation for the Elmore investigation and his various other investigations. One of these other investigations involved the Mountain View Airport. Hughes was approached by three Mountain View citizens with information about suspicious late night airplane landings and takeoffs on a remote segment of the airport's runway. Hughes testified that he received information that a pilot had been offered a large sum of money to fly drugs in and out of the Mountain View Airport. Hughes passed this information to Captain McKee, who encouraged Hughes to conduct a surveillance at the airport. Later, a state representative whose plane was housed at the Mountain View Airport complained about Hughes' surveillance to Superintendent Whitmer. Despite this complaint, Captain McKee encouraged Hughes to continue the investigation and, at Hughes' request, placed a call to Jefferson City for special night surveillance equipment to aid in identifying the airplanes making night flights. Hughes testified that soon after he made the request for surveillance equipment, the suspicious night flights ceased. Hughes never again requested or received the night surveillance equipment. Hughes testified that he spent an entire year on his airport surveillance without finding any tangible evidence of impropriety.

Hughes also testified that he had received information that Captain McKee was involved in a ticket-fixing incident some six years ago. Captain McKee denied having ever fixed any traffic ticket. Hughes also testified that he had received information that Captain McKee and Lt. Hickman

were involved in a cover-up of a prisoner abuse incident. Hughes referred to a report written by Trooper Mitchell and Sergeant Zorsch indicating that an officer had allegedly struck an arrestee. Captain McKee allegedly concealed this report and, after interviewing the officer involved in the alleged beating, collaborated with Lt. Hickman in writing another report discrediting the arrestee's allegations. Sergeant Zorsch testified that while he believed some of the arrestee's allegations were true, Captain McKee could have reasonably reached a different conclusion and was not trying to coverup something.

Hughes testified that he told his wealthy industrialist friend, Claud Trieman, a member of the Governor's Crime Commission, about the alleged ticket fixing and prisoner abuse incidents.[1] Hughes did so in the hope that his friend could intercede with the higher echelon at Patrol headquarters to initiate some reform in Troop "G." Superintendent Whitmer and Major Hoffman testified that they were completely unaware of Hughes' suspicions of improprieties in Troop "G." Hughes testified that he never told Hoffman or anybody else within the Patrol's command staff about his suspicions.

Over the past few years Hughes also became involved in other incidents of some concern to the community and to his fellow officers. In 1977, while patrolling a wooded area, Hughes discovered two teachers engaged in a "compromising assignation." Hughes, while off-duty, reported this encounter to the school board. In 1979, Hughes was reprimanded for openly accusing a local postal employee of slashing the tires of Hughes' car without sufficient evidence to support his accusations. These accusation were

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[1]Hughes also enlisted the aid of this friend in Hughes' unsuccessful bid to become Superintendent of the Patrol. Major Hoffman became and is now the Superintendent of the Patrol.

made while Hughes was off-duty. Hughes was also criticized by some of his fellow officers for spending too much time patrolling the Mountain View area so that he could associate with his wealthy industrialist friend, Claud Trieman, while on duty and for filing baseless written reports accusing radio operators of dereliction of duty. Finally, some officers, including Lt. Hickman and Captain McKee, suspected that Hughes furnished a local sheriff with a copy of a Patrol investigation of the sheriff's alleged involvement in a timber theft.

On October 3, 1981, Lt. Elmore met with Superintendent Whitmer and suggested that Hughes be transferred to Troop "C." Superintendent Whitmer testified, however, that no decision concerning Hughes was reached at this meeting. It is unclear from the record when the decision to transfer Hughes was actually reached. Superintendent Whitmer was uncertain about the exact date, but surmised it was Thursday, October 15, 1981. Major Hoffman testified that the decision was made the morning of October 16, 1981, the day Hughes was told of the decision.

In any event, on October 4, Elmore returned to Troop "G" and told several troopers that he was having Hughes transferred to Troop "C." Dissension then began to mount in Troop "G" as troopers took sides over the rumored transfer of Hughes. Around October 7, Captain McKee testified that he reported this dissension to Major Hoffman. Major Hoffman then investigated the matter, interviewed a number of Troop "G" officers, and wrote a report, dated October 13, 1981, in which he concluded that there was a serious morale problem in Troop "G" because of the conflict between Lt. Elmore and Trooper Hughes. Major Hoffman recommended that both Elmore and Hughes be transferred to correct the situation.

Almost simultaneously with Major Hoffman's investi-

gation, Lt. Elmore wrote his own memorandum entitled "Disciplinary Action—Trooper W. E. Hughes." In this memorandum Elmore stated that Hughes had caused Troop "G" to lose its effectiveness because of Hughes' "seemingly uncontrollable actions" and recommended that Hughes be transferred. These "uncontrollable actions" included Hughes' investigation of Elmore's son, Hughes' close relationship with Claud Trieman, and Hughes' "actions toward other public and private individuals."

Lt. Hickman added his own remarks to Lt. Elmore's memorandum and also recommended Hughes' transfer. Hickman noted that Hughes never consulted him regarding the investigation of Elmore's son and that Hughes was spending too much of his time patrolling the Mountain View area, where an officer was already stationed. Hickman added his suspicion that Hughes had given a local sheriff a copy of a Patrol investigation report concerning the sheriff.

Captain McKee also attached his remarks to this memorandum, suggesting that because the intense bitterness between Hughes and Elmore was disrupting the entire troop, Hughes should be transferred at state expense to another troop. McKee also noted Hughes' various "controversial actions," including his report about the two school teachers, his foundless accusations that a fellow resident had slashed Hughes' car tires, and his on-the-job association with Claud Trieman in the Mountain View area who allegedly was to help Hughes in his bid to become Superintendent. McKee also wrote another report in which he recommended that Lt. Elmore also be transferred because he had contributed to dissension in Troop "G."

Superintendent Whitmer endorsed the reports written by Major Hoffman and Captain McKee. Whitmer also signed the memorandum that included the recommenda-

tions of Lt. Elmore, Lt. Hickman, and Captain McKee. Whitmer, believing that both Hughes and Elmore had contributed to dissension in the troop, transferred Hughes to Troop "C," effective October 19, 1981, and transferred Lt. Elmore to Troop "D," effective November 1, 1981. Hughes was offered moving expenses and was provided the same job status and pay in Troop "C" as he had enjoyed in Troop "G."

Two weeks after the transfer decision, Hughes filed this § 1983 suit in federal district court claiming that the state's failure to provide him with a name-clearing hearing violated his substantive and procedural fourteenth amendment due process rights as well as his right to equal protection. U.S. Const. Amend. XIV. Hughes also alleged that he was transferred in retaliation for exercising his first amendment rights. The district court held that Hughes' transfer was disciplinary and, therefore, under Missouri law, Hughes was entitled to a due process hearing before he could be transferred. The district court enjoined the Patrol's order transferring Hughes to Troop "C" until the Patrol provides Hughes with a hearing. The appeal to the Eighth Circuit Court of Appeals ensued.

After the appellate court entered its decision, the petitioner requested a rehearing by the entire court. The court refused to rehear the case, although four judges, including the dissenter in division, stated that they would have granted rehearing on the First Amendment question *only*. This petition for certiorari followed.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The decision of the Court of Appeals to address and decide the issues relating to the petitioner's First Amendment claims, even though the district court had not reached these issues in its original opinion, is not in conflict with the applicable authority of this or any other federal court, but rather follows well established precedent of this court.

In his first reason presented in support of his request for certiorari, the petitioner attempts to convince this Court that the decision of the Court of Appeals is contrary to decisions of other federal appellate courts. The petitioner calls upon this Court to exercise its supervisory power over the lower federal courts, and resolve this alleged conflict. In truth, the petitioner has contrived this so-called conflict among the circuits when one does not in fact exist.

Precisely, petitioner contends that the Court of Appeals erred when it proceeded to decide his claim that his transfer from one highway patrol troop to another was designed to punish him for the exercise by him of his First Amendment rights. Petitioner contends that although the record had been fully developed in the district court, the appellate court should have remanded the case to the district judge for his initial findings and decision on these First Amendment claims. In support of his contention that the course taken by the appellate court in this instance conflicts with decisions of other federal appellate courts, and departs from the "usual practice" in cases where the district court has not reached a particular issue, the petitioner cites several decisions.

The primary decision relied upon by the petitioner to support his conflict argument is *MacFarlane* v. *Grasso,*

696 F.2d 217 (2nd Cir. 1982). However, this case is inapposite. In *Grasso,* the appeal was from a judgment sustaining the defendant's motion to dismiss for failure to state a claim. There had been absolutely *no record* developed in the lower court on the plaintiff's First Amendment contentions, and thus a remand was the only alternative open to the appellate court once it decided that the lower court had erred in granting the defendant's motion to dismiss for failure to state a claim relating to the plaintiff's First Amendment contentions. This was not the situation in the case at bar since the petitioner had been given his day in court, and had presented all of his evidence on his First Amendment claims. Therefore, it is ludicrous to contend that the decision of the Eighth Circuit in the instant case conflicts with that of the Second Circuit in *Grasso.* This in essence destroys the petitioner's conflict in the circuits contention. Furthermore, the petitioner's contention that the appellate court departed from the "usual" practice of remanding for initial findings and decision by the district court on the First Amendment issues does not provide him with a basis for seeking review by this Court.

In presenting his concocted argument that the appellate court did not follow the normal practice of remanding, the petitioner totally ignores an entire line of decisions by this Court holding that remand is inappropriate where the facts on the record are susceptible to only one reasonable interpretation. *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526 (1979); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). As this Court has pointed out, the general rule that an appellate court should remand when the lower court has not reached a particular issue in its original order is not an inflexible one, and it does give way in those circumstances where the record before the appellate court leads to only reasonable result on the legal issue presented. *Hormel* v. *Helvering,* 312 U.S. 552 (1941). This Court suc-

cintly pointed out in the case of *Levin* v. *Mississippi River Fuel Corporation*, 386 U.S. 162 (1967), that in such cases "[e]ffective judicial administration" requires that the court of appeals draw the inescapable factual conclusion itself, rather than remand the case to the district court for further needless proceedings.

Despite the efforts of both the petitioner, and the dissenter in the appellate court, to concoct some sort of credibility issue necessitating remand, it is clear that the majority opinion in the Eighth Circuit was following this Court's admonitions in the above cases when it reached the petitioner's First Amendment claims and decided them based upon the record before it. This is best shown by an examination of Judge Gibson's majority decision itself.

In this case, the majority of the appellate court proceeded to decide the petitioner's First Amendment claims because the record was clearly sufficient to dispose of the question, the record was susceptible to only one reasonable interpretation on the issue, and judicial economy as expressed by this Court's prior opinions demanded such action. See Appendix at 18, 20 and 33. In this regard, the majority opinion specifically held:

> "In this case, the record before us is sufficient to dispose of Hughes' claim that he was retaliated against for exercising his first amendment rights.
>
> . . . .
>
> Despite the district court's failure to so find, the evidence in the record clearly shows that there was a substantial morale problem in Troop 'G' due to a personality dispute between Lt. Elmore and Hughes. Superintendent Whitmer, the ultimate transferring authority, Major Hoffman, whom the Superintendent ultimately relied upon in making the transfer decision, and Captain McKee all testified that an intense per-

sonality conflict existed between Elmore and Hughes. Major Hoffman, who conducted interviews with a number of Troop 'G' patrolmen, including Elmore and Hughes, concluded that because of this conflict, Hughes and Elmore had lost their effectiveness and were disrupting the effectiveness of the entire troop. Major Hoffman determined that the major source of the friction between Hughes and Elmore was Hughes' various investigations and allegations regarding Elmore's son's drug-related activities. Hughes had also apparently become involved in a problem between the Elmore family and the parents of a 16-year-old girl who had been dating Elmore's son. Elmore reciprocated by conducting his own investigation of Hughes and by indicating his intention to file a defamation of character suit against Hughes. During their interviews with Hoffman, both Hughes and Elmore expressed their personal dislike for each other.

. . . .

Based on the foregoing evidence, we believe the Superintendent reasonably concluded that both Hughes and Elmore contributed to the morale problem in Troop 'G,' leading the Superintendent to exercise his statutory discretion and reassign both officers to other troops. . . .

Furthermore, the transfer decision here was an entirely appropriate and reasonable means of achieving the Patrol's significant interest in maintaining discipline and harmony. Admittedly, a transfer traceable to speech-related activity is properly the subject of first amendment challenge, even though the transfer resulted in no loss of pay, seniority, or other benefit. [Citations omitted]. However, because the officers in Troop 'G' had divided their loyalties between Hughes

and Elmore, the Superintendent was required to devise a solution that would appear completely impartial and, at the same time, improve the morale and efficiency of the troop. With this in mind, the Superintendent viewed a transfer of both Elmore and Hughes as an effective, nondiscriminatory and nonpunitive solution to the morale problem. . . ." (Appendix at 18-25)

On the petitioner's contention that his co-called whistleblowing activities might have been the basis for his transfer to another troop, the majority observed:

"Hughes claims that his transfer was made in retaliation for his investigations and allegations regarding the ticket-fixing incident and the cover-up of the police brutality incident. Were this true, a different case would be presented. [Citation omitted]. However, the evidence clearly shows neither Superintendent Whitmer nor Major Hoffman ever knew about, let alone disapproved of or attempted to interfere with, Hughes' investigations and expressions regarding the alleged ticket-fixing or police brutality. Furthermore, there is no evidence that the dissension that existed within Troop 'G' was even remotely related to Hughes' investigations and expressions regarding these alleged improprieties. Superintendent Whitmer testified that he was completely unaware of Hughes' allegations of improprieties until Hughes testified about them at trial. Major Hoffman testified that the alleged improprieties were never mentioned by any of the troopers he interviewed, not even by Hughes. Hughes testified that despite having the opportunity, he never told Hoffman or anybody else within the Patrol's command staff about his investigations concerning these alleged improprieties; nor did Hughes ever file any report

regarding these incidents. Under the circumstances, we do not believe Hughes has shown or indeed can ever show that his reputed whistle-blowing investigations were what caused his transfer." (Appendix at 30, 31)

Finally, the majority reached the petitioner's rather esoteric "political association" argument and concluded:

> "Despite the dissent's suggestion, there is no support for Hughes' claim that his off-duty first amendment protected association with Claud Trieman was a 'motivating factor' behind the transfer decision, let alone the 'but for' cause of the transfer decision. [Citation omitted]. The record does show that other troopers complained that Hughes' on-the-job association with Trieman was interfering with the performance of his duties. Troopers also expressed the belief that Hughes was currying favors in order to elicit Trieman's support in his bid for the Superintendent's position. However, even the dissent is not so bold as to suggest Hughes' associational rights permit him to associate with whomever he likes and whenever he likes while he is on duty. And, even assuming this criticism of Hughes' on-duty association with Trieman is interpreted as an implied criticism of Hughes' legitimate off-duty association with Trieman, we believe the record clearly shows that the transfer decision would have been made regardless of such association. The primary source of the dissension in Troop 'G' concerned Hughes' and Elmore's battle over Elmore's son's possible involvement in drug-related activity. Hughes' association with Trieman was peripheral to this dissension and, hence, was not at the center of the Superintendent's effort to remedy the dissension by transferring both Hughes and Elmore out of Troop 'G.'" (Appendix at 32, 33).

In light of the record before it, the majority of the Court of Appeals concluded that "it is unnecessary and would be a waste of judicial resources to remand this case to the district court. . . ." (Appendix at 33). The majority of the appellate court was clearly following this Court's decisions as to when it is appropriate for an appellate court to decide an issue rather than remand it to the district court.

In an hysterical attempt to challenge this course of action by the majority of the appellate court, both the petitioner and the dissenting judge in the Eighth Circuit, have concocted the position that somehow credibility judgments are involved in deciding the First Amendment claims presented by Hughes, and these judgments should be left to the district court in the first instance. The petitioner even goes so far as to engage in the ethically questionable practice of bringing information before this Court that was not part of the record below, did not even exist at the time the transfer decisions were made, and thus has no relevancy to the issues currently before the Court.[2] As the majority of the Court of Appeals pointed out, the only way the dissent and the petitioner can support this credibility argument so as to justify a remand is by distorting the actual record that was before the appellate court. See Appendix at 22, 23 and 32, fn. 13, 14 and 20. Obviously, the majority refused to go along with this contrived position and distortion of the record presented by the dissenting opinion and the petitioner, and proceeded to determine the issue based upon the actual record before it. An examination of the record leads to only one conclusion, that the petitioner and Lt. Elmore were transferred from Troop "G" to other troops

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[2]The petitioner's half-hearted effort to justify his attempts to bring before this Court evidence not a part of the record in this case by invoking the rule on requests for admissions is clearly laughable.

within the highway patrol system because of the dissension that their personal conflicts had caused within Troop "G." Thus, the appellate court was acting well within its discretion in proceeding to decide the petitioner's First Amendment claims, and there is no reason for this Court to grant certiorari on this question.

II.

There is no basis for this court to grant the petition for certiorari for the purpose of reviewing the appellate court's decision relating to the petitioner's First Amendment claims since it is clear from the record in this case that the majority opinion of the United States Court of Appeals for the Eighth Circuit correctly followed and applied the controlling precedents of this court when it decided the First Amendment issues against the petitioner.

In Point II of his petition for certiorari Mr. Hughes urges this Court to grant his writ so that it might review the decision of the Court of Appeals rejecting his First Amendment contentions on the merits. In a truly extraordinary harangue better suited to the *National Enquirer* than a petition filed with the United States Supreme Court, Hughes accuses both the Missouri State Highway Patrol and Judges Floyd and John Gibson of the United States Court of Appeals for the Eighth Circuit of engaging in a Watergate-type conspiracy for the purpose of denying him his rights as guaranteed by the First Amendment to the United States Constitution. In essence, one must presume that Mr. Hughes is of the opinion that if a federal appellate court disagrees with his contentions, its members are automatically guilty of a criminal conspiracy. A more absurd theory could not be conceived.

The respondent relies upon the well-reasoned decision of the majority of the Court of Appeals in urging this

Court to reject this contention of the petitioner, and his request for certiorari on this ground. An examination of Judge Gibson's majority opinion makes it clear that in deciding the First Amendment issues presented to the Court by Mr. Hughes, the appellate court applied the correct precedent from this Court to the issues. Not even petitioner's counsel is so bold as to assert that Judge Gibson ignored the correct law on the issue when he decided the First Amendment contentions against Mr. Hughes. Respondent further asserts that an examination of the majority opinion reveals that Judge Gibson correctly applied the controlling legal precedent on this issue to the facts of the Hughes' case.

Consequently, in light of the state of the record and the well-reasoned decision of the majority of the Eighth Circuit, respondent sees no reason for this Court to review the decision below. The appellate court's decision is not in conflict with any prior decision of this Court nor of any other federal appellate court. Furthermore, the petitioner does not present a novel legal issue here but rather one that has been previously addressed and resolved by this Court. The law on this subject has been clearly enunciated by this Court, and it needs no further elaboration or clarification. Therefore, another decision by the Court in this area of the law would have little precedential impact. This being the case, there is no reason for this Court to grant certiorari to review the appellate court's decision on this issue.

III.

This court should refuse to grant the petitioner's request for certiorari in order to review the appellate court's decision that petitioner was not entitled to a hearing prior to his transfer from one troop of the highway patrol to another since the petitioner did not have a legitimate claim

of entitlement to an identifiable property or liberty interest in remaining at one troop within the Missouri State Highway Patrol, and thus no right to a hearing prior to transfer.

In Argument III the petitioner asks this Court to review the decision of the appellate court rejecting his contention that he was entitled to a due process hearing prior to his transfer from one troop of the Missouri State Highway Patrol to another. In making this request, the petitioner is forced to rely upon the original decision of the district court in this case since no one except Judge Wright has agreed with this contention at any time in these proceedings. Even Judge McMillian who dissented from the majority opinion in the appellate court on the First Amendment issue agreed with the majority's decision rejecting petitioner's claim of entitlement to a due process hearing prior to his transfer. In fact no one on the Court of Appeals expressed agreement with this position of the petitioner. Certainly, these facts account for the petitioner's suggestion that he should not be required to present "full argument" on this issue in his petition for certiorari but that said argument is better reserved for the brief on the merits. As the majority opinion so clearly points out, there is no basis whatsoever for this contention of the petitioner, and it is clear that his "argument" in support of this position would fall like a house of cards if he is attempted to set it forth fully in his petition for certiorari.

Once again, respondent relies upon the well-reasoned decision of the Court of Appeals rejecting the petitioner's contention that he was entitled to a hearing prior to his transfer in urging this Court to reject Hughes' request for review on this issue. It is clear that the appellate court applied the correct precedent of this Court when it decided that petitioner did not have a legitimate claim of entitlement to an identifiable property or liberty interest, and thus was not entitled to a due process hearing prior to his

transfer from one troop of the Missouri State Highway Patrol to another. In reaching this result, the Court of Appeals followed the precedent established by this Court in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), *Perry* v. *Sindermann*, 408 U.S. 593 (1972), *Bishop* v. *Wood*, 426 U.S. 341 (1976), *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), *Paul* v. *Davis*, 424 U.S. 693 (1976) and *Meachum* v. *Fano*, 427 U.S. 215 (1976). In addition there is no question but that the appellate court correctly applied these legal precedents to the facts of the instant case.

Specifically, after appropriately analyzing Missouri law on the subject, the Court of Appeals held:

> "Hughes, therefore, has no due process property interest in his assignment to Troop 'G.' At best, he has exhibited an unilateral hope of permanent residence in Willow Springs." (Appendix at 11, 12)

In addition, the court rejected the petitioner's contention that he was entitled to a due process hearing based upon his asserted liberty interest as follows:

> "Even if we assume for the sake of argument that Hughes' transfer publicly communicated the impression that Hughes had committed a serious infraction, we conclude that Hughes has failed to show some change of legal status that occurred in conjunction with the release of the stigmatizing information." (Appendix at 16)

Furthermore, as was the case with Argument II of petitioner, he does not present a novel legal issue here but rather one that has been previously addressed and resolved by this Court. The law on this subject has been clearly enunciated by this Court, and it needs no further elaboration or clarification. Another decision by the Court in this area would have little precedential impact. Consequently, respondent submits that there is no reason for this Court

to grant certiorari for the purpose of reviewing the appellate court's decision regarding the petitioner's due process claims.

CONCLUSION

For these reasons the petition for certiorari should be denied.

Respectfully submitted,

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